Supreme Court, U.S.
FILED
OCT 29 2008
OFFICE OF THE CLERK

10

No. 08-591

In The

Supreme Court of the United States

J. MARK SAMPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

PER C. OLSON, OSB #93386
Counsel of Record
RONALD H. HOEVET
HOEVET, BOISE & OLSON, P.C.
1000 S.W. Broadway, Suite 1500
Portland, Oregon 97205
Telephone: (503) 228-0497

October 29, 2008

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the government violated petitioner's right to Due Process when it lied to petitioner about his status as a target of a criminal investigation and hid the U.S. Attorney's involvement with the SEC's investigation in order to induce petitioner to waive his privilege against self-incrimination.

2. Whether the government violated petitioner's right to Due Process when it exploited his lawyer's actual conflict of interest to obtain incriminating testimony from the petitioner and to receive attorney/client privileged communications.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are:

The United States of America, plaintiff and appellant in the Court of Appeals;

J. Kenneth Stringer, III, defendant and appellee in the Court of Appeals;

J. Mark Samper, defendant and appellee in the Court of Appeals; and

William N. Martin, defendant and appellee in the Court of Appeals.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
I. Evidentiary Hearing	3
II. The District Court's Ruling	21
III. The Ninth Circuit Opinion	24
SUMMARY OF REASONS FOR GRANTING REVIEW	26
ARGUMENT	28
I. The Supreme Court Should Reaffirm The Principle Established In *Kordel* That The Failure To Warn A Target Of A Civil Investigation That He Is Also A Target Of A Criminal Investigation Constitutes A Due Process Violation	28
II. The Government Violated Petitioner's Right To Due Process When It Exploited His Lawyer's Actual Conflict Of Interest	33
CONCLUSION	42

TABLE OF CONTENTS – Continued

Page

APPENDIX

Order Amending Opinion and Amended Opinion of the United States Court of Appeals for the Ninth Circuit, *United States v. Stringer*, No. 06-30100 (July 31, 2008) ..... App. 1

Opinion and Order of the United States District Court for the District of Oregon, *United States v. Stringer*, CR 03-432-HA (January 9, 2006) ..... App. 30

TABLE OF AUTHORITIES

Page

CASES

Kentucky West Virginia Gas Co. v. Pennsylvania PUC, 837 F.2d 600 (3rd Cir. 1988) 41

Lisenba v. California, 314 U.S. 219 (1941).....28

SEC v. Higashi, 359 F.2d 550 (9th Cir. 1966).....40, 41

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).....33

United States v. Agurs, 427 U.S. 97 (1976).....40

United States v. Haynes, 216 F.3d 789 (9th Cir. 2000).....39

United States v. Irwin, 612 F.2d 1182 (9th Cir. 1980).....40

United States v. Kordel, 397 U.S. 1 (1970) .....*passim*

United States v. Stein, 541 F.3d 130 (2nd Cir. 2008).....35, 36

United States v. Stringer, 408 F. Supp. 2d 1083 (D. Or. 2006).....1

United States v. Stringer, 521 F.3d 1189, *amended by*, 535 F.3d 929 (2008) 1

United States v. Tatum, 943 F.2d 370 (4th Cir. 1991).....40

United States v. Thayer, 214 F. Supp. 929 (D. Colo. 1963).....30

TABLE OF AUTHORITIES – Continued

Page

STATUTORY AND CONSTITUTIONAL AUTHORITIES

United States Code, Title 28, section 1254(1) 1

United States Constitution,
Fifth Amendment .....*passim*

OTHER AUTHORITIES

37 Am. Crim. L. Rev. 147 (Spring, 2000) 37

N. Richard Janis, "Taking the Stand – Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice is Being Destroyed," D.C. Bar Journal, March 2005 37

Paul J. McNulty, "Against Backdrop in Setback in KPMG Case, Feds Revise McNulty Memo," 23 No. 1 Andrews White-Collar Crime Reporter, 2 (Sept. 29, 2008) 36

"Principles of Federal Prosecution of Business Organizations," www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm 34

OPINIONS BELOW

The opinion and order of the United States District Court, District of Oregon, is reported at *United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006) (App. 30). The decision of the United States Court of Appeals for the Ninth Circuit is reported at *United States v. Stringer*, 521 F.3d 1189, *amended by*, 535 F.3d 929 (2008) (App. 1).

JURISDICTION

The opinion of the Ninth Circuit was entered on April 4, 2008. On July 31, 2008, the Court of Appeals denied petitioner's timely Petition for Rehearing *En Banc*, and issued an amended opinion. This Court has jurisdiction to review on a writ of certiorari the judgment of the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides that "No person shall * * * be deprived of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

The government indicted petitioner J. Mark Samper, J. Kenneth Stringer, and William N. Martin on multiple counts of securities, wire and mail fraud based on their alleged conduct as officers of FLIR Systems, Inc., ("FLIR"), a Portland, Oregon, corporation that sells infrared and heat-sensing cameras for military and industrial use. Samper was FLIR's Chief Financial Officer, Stringer its Chief Executive Officer, and Martin its Vice President of Sales and Marketing. Defendants filed motions to dismiss the indictment on the grounds of outrageous government conduct and violations of defendants' Fifth Amendment right of Due Process, asserting that the government used trickery and deceit to conceal from them the fact that they were targets of a secret criminal investigation during the course of a civil investigation conducted by the Securities and Exchange Commission (SEC). In addition, petitioner Samper argued that the government violated his right to Due Process by exploiting a conflict of interest that existed by virtue of his lawyer's representation of FLIR and its employees who were cooperating with the government by incriminating Samper.

Following an evidentiary hearing, the United States District Court for the District of Oregon dismissed the indictment on the grounds of a Due Process violation and outrageous government conduct, and alternatively suppressed defendants' statements to the SEC and other evidence. What follows is a summary of the evidence adduced at the evidentiary

hearing, a summary of the district court's ruling, and a summary of the Ninth Circuit's opinion reversing the decision of the district court and remanding for further proceedings.

I. Evidentiary Hearing

a. The SEC and USAO open an investigation into securities fraud

In June of 2000, the SEC opened a formal civil investigation into allegations of accounting fraud at FLIR based on a former employee's claim that FLIR had devised fraudulent accounting devices to inflate the company's publicly stated earnings. From the beginning of its investigation, the SEC knew that petitioner would be the focus of inquiry given his role as head of FLIR's financial department, and that the allegations were criminal in nature.

FLIR and its officers also were named as defendants in several civil suits brought by shareholders. FLIR was represented by Lois Rosenbaum and Barnes Ellis, attorneys with the Portland firm of Stoel Rives, LLP. (SER1057).[1] FLIR wanted Stoel Rives to also represent Samper and Ken Stringer. (SER1057-58). Rosenbaum told Samper

> "the best interests of all defendants favor the presentation of as unified a defense as possible

---

[1] "SER" refers to petitioner's Supplemental Excerpt of Record filed in the Ninth Circuit.

> and the minimization of defense costs. * * * Based on our present knowledge of the facts, we do not anticipate that any conflicts will arise among the defendants. * * * . We * * * undertake to inform you at the earliest possible time if we perceive that a conflict among any of the defendants is developing."

(SER1035). Thereafter, Stoel Rives represented Samper in the civil shareholder actions and also was Samper's primary counsel in the SEC investigation. (SER1059). Ellis told Samper that FLIR and Samper would either rise or fall together, and that it was in both parties' interest to work together. (SER1058). Samper also was represented by Peter Glade who became Samper's "monitoring counsel," which meant that he generally would be aware of events so that he could step in as Samper's sole counsel if a conflict of interest developed between Samper and Stoel Rives' other clients. (SER1058).

On June 22 and 23, 2000, SEC attorney Lorraine Echavarria, whose office was in Los Angeles, came to Portland to take the sworn testimony of Tom Widdows, FLIR's former controller. (SER0502). Widdows testified that Ken Stringer and Samper consistently would override FLIR's revenue recognition policy and other accounting controls at the end of every quarter. (SER0503; SER0506-09). During this trip to Portland, Echavarria and her supervisor Diana Tani met with Assistant U.S. Attorney (AUSA) Charles Gorder to

ask that he open a criminal investigation into Samper and others. (ER0868).[2] On June 26, Gorder wrote a letter to Tani with the subject line reading, "Flir Systems, Inc.; J. Ken Stringer, III; J. Mark Samper." The letter stated that the U.S. Attorney's office (hereinafter "USAO") and the FBI were opening a criminal investigation into the matter, and that AUSA Kent Robinson had been assigned to the case. AUSA Gorder requested access to the SEC's investigative materials. Thereafter, the SEC sent all material obtained in its investigation, including subpoenaed documents and Samper's sworn testimony, to the FBI and the USAO.

The SEC sent out its first round of subpoenas to FLIR, Samper, and other employees on June 30, 2000. The subpoenas, and all subsequent subpoenas issued throughout the course of the SEC investigation, were accompanied by a standardized document entitled, "SECURITIES AND EXCHANGE COMMISSION * * * Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena." (ER1051) (hereinafter "Form 1662"). Form 1662 states that the SEC may provide information obtained through its investigation to other agencies, including the U.S. Attorney. (ER1053). The form also stated that information provided by the

---

[2] "ER" refers to the Excerpt of Record filed by the government in the Ninth Circuit.

subpoenaed party could be used against him in a criminal proceeding, and stated that the person could assert his right under the Fifth Amendment against self-incrimination. (ER1051-52).

However, the letter sent to Mr. Samper with the subpoena provided:

> "Has the Commission determined that anyone has done anything wrong? * * * We are trying to determine whether there have been any violations of the federal securities laws. The investigation and the subpoena do not mean that we have concluded that you or anyone else has broken the law. Also, the investigation does not mean that we have a negative opinion of any person, entity or security." (ER1043).

The same Form 1662 and letter accompanied a second subpoena served on Samper on August 20, 2001. (ER1151). The letters were not true because the SEC had already determined that Samper had broken the law.

On July 19, 2000, Rosenbaum told Echavarria that Stoel Rives was representing FLIR and a number of FLIR personnel, and that Stoel Rives was co-counsel with Glade for Samper. (ER1057). Echavarria responded by stating that Stoel Rives may have a conflict of interest in representing FLIR and the various individuals. (ER1058). She stated, "Although it is far too early in the investigation for the SEC staff to identify people who may possess liability, we are

troubled by the scope and breadth of your representation." Echavarria did not tell Rosenbaum that the SEC had already referred Samper to the USAO for prosecution, and that the USAO had accepted that referral. (ER0738-39).

Despite the obvious conflict, Echavarria told Rosenbaum that the SEC would "honor" Stoel Rives' representation of FLIR, Samper, and other individuals. (SER0567). Echavarria testified at the evidentiary hearing that SEC policy precluded her from taking any further steps to remove counsel. (ER0231). However, the government did not produce any evidence of such a policy.

The SEC never again raised the issue of a conflict with Rosenbaum. (ER0232-34). Echavarria never discussed the matter with Glade. (ER0234). Echavarria admitted in the evidentiary hearing that she knew that Stoel Rives had a conflict of interest when she took the sworn testimony of Rosenbaum's other clients who provided damaging testimony against Samper. (ER0237-41, ER0246).

b. Stoel Rives advises Samper to cooperate with the SEC's investigation

Rosenbaum advised Samper to cooperate in the SEC investigation and to give sworn testimony. (ER0742-43). She never advised Samper about his Fifth Amendment right against self-incrimination, because she did not believe there was a criminal investigation. (ER0802). Rosenbaum felt that it was

"ridiculous" for Samper to assert the privilege against self-incrimination. (ER1059).

Rosenbaum testified that, had she known about the SEC's referral to the USAO, she would have obtained a criminal defense lawyer for Samper and advised him of his Fifth Amendment privilege. (ER0802-03; SER1059). Samper testified that he was unaware that the SEC made a criminal referral in June 2000, and that, had he known, he would not have waived the Fifth Amendment privilege. (SER1065).

By August 2000, Stoel Rives was representing FLIR and virtually every FLIR officer, director or employee who had been subpoenaed by the SEC. (SER0571; ER0240-41). On August 14, 2000, Echavarria took the sworn testimony of FLIR employee Kim Hunter who was represented by Rosenbaum. (SER0576A). Hunter testified adversely to Samper about a particular transaction the government later claimed should not have been recognized as earned revenue. (SER0576B-C). This transaction was later alleged as fraudulent in the indictment. (ER0035). Echavarria admitted at the hearing that Hunter provided damaging evidence against Samper. (ER0239-40).

c. The government keeps the criminal investigation hidden to induce statements from defendants

In August 2000, the SEC reported to the FBI that Samper had fraudulently recorded sales and accounts

receivable on FLIR's financial statements for 1998 and 1999. (SER0577). In a meeting on October 3, 2000, the SEC lawyers told AUSA Robinson that the evidence supported criminal wire fraud charges. (App. 8). Robinson knew that Rosenbaum was representing Samper. (ER0685). Robinson and the SEC lawyers discussed the conflict of interest issue arising out of Stoel Rives' joint representation. (ER0416; ER0447-48). Robinson testified that there was a discussion about how FLIR was not cooperating with the SEC investigation. He said he contemplated issuing grand jury subpoenas to produce cooperation, and added that grand jury subpoenas would result in breaking up Stoel Rives' multiple representation. (ER0568-69, ER0590, ER0613; ER0448, ER0450). As memorialized in a critical FBI memorandum, only half of which is described in the Ninth Circuit's opinion, the USAO and SEC made the following decision in October of 2000:

> "It was determined that since Stringer has agreed to be interviewed by the SEC, the FBI will make no effort to interview Stringer or other corporate officers at this time *so as not to jeopardize the opportunity to obtain statements from these individuals*." (ER1083) (emphasized portion left out of the panel's decision).

Furthermore, in a memorandum dated October 13, 2000, Robinson noted that the SEC soon would be interviewing Samper. (ER1077). "Absent a persuasive

and complete explanation from [Samper], the case warrants prosecution," he wrote. (ER1077).

On October 19, 2000, Samper gave sworn testimony to the SEC. (ER1080). The SEC reported to Robinson the results of Samper's sworn testimony. (ER1084). The SEC told Robinson that Samper had made admissions regarding certain transactions and that Samper was willing to be interviewed again. (ER1084-85). Robinson's thought about issuing grand jury subpoenas to cause greater cooperation was short-lived. (ER0568). He decided that grand jury subpoenas were not necessary, because FLIR became "very cooperative." (ER0568; ER1103).

d. The government presses FLIR to increase its cooperation in December 11 meeting

FLIR improved its cooperation after a meeting with the SEC in Los Angeles on December 11, 2000, attended by FLIR's CEO and Chairman of the Board Earl Lewis, Ellis and Rosenbaum. (SER0371). At this meeting, the SEC told FLIR that it was not happy with FLIR's level of cooperation. (*Id.*) Lewis assured the SEC that FLIR's cooperation would "increase" going forward. (SER0371). On December 15, 2000, Rosenbaum reaffirmed "our pledge to cooperate with your investigation in any manner we reasonably can." (SER0645). Thereafter, SEC lawyers said they were satisfied with FLIR's cooperation. (SER0374).

FLIR invited the SEC to tour its facilities and to hold informal interviews of FLIR employees on January 23-24, 2001. (ER1095-1102). Rosenbaum participated in those interviews. (ER1098, ER1011). The SEC lawyers met with AUSA Robinson and the FBI on January 25, 2001, to describe the December 11 meeting and their two days at FLIR. (ER1096; ER1101-1102). The SEC lawyers described FLIR as "extremely cooperative." (ER1095). Therefore, Robinson decided not to conduct an "overt" FBI investigation, but instead would wait until "the conclusion of the scheduled [SEC] interviews * * * to determine the criminal violations to be pursued." (ER1097).

e. The government continues to hide the criminal investigation while obtaining witness statements from FLIR employees represented by Stoel Rives

The government intentionally hid the USAO's involvement in the investigation. When the SEC ordered CD ROMs of the SEC interviews for delivery to AUSA Robinson, the SEC made sure that the court reporter did not convey the USAO's participation to Samper's lawyer. (ER1245). Echavarria made a point of ensuring that a prosecutor would not be present in meetings with Samper's lawyer, so as not to tip her off to the criminal investigation. (ER1122). Echavarria was evasive when asked by Ken Stringer's lawyer whether Stringer was a target of a criminal investigation. She falsely told Stringer that the SEC did not have "targets" – a claim contradicted by SEC's own

documents describing Stringer and Samper as targets. (App. 37-38).

Throughout the investigation, Stoel Rives continued to represent FLIR employees who gave sworn statements to the SEC implicating Samper in fraudulent conduct. Gina Chambers told the SEC that Samper told her in April 1999 to destroy a document showing that products had been shipped to a bonded warehouse solely to recognize revenue and then later returned. (SER0661-0679). Chambers said that Samper told her that he did not want people to review it. (SER0665). Chambers also testified that Samper told her to identify systems in inventory that could be shipped as "placeholders" for the actual system ordered by the customer, Raytheon, to recognize revenue. (SER0762-69). Chambers also testified that in July 1999, Samper told her to incorrectly designate some units as "customer-owned units." (SER0775-78). The foregoing transactions were later alleged in the indictment. Echavarria admitted that Chambers provided damaging evidence against Samper. (ER0239-240).

Rosenbaum also represented David Muessle in the SEC investigation. (ER0772). Muessle became FLIR's controller in 2000. (ER0773). In the December 11, 2000, meeting, the SEC asked FLIR to review several past transactions that it deemed questionable. (SER0655). Muessle conducted that review which in part led to a restatement of FLIR's financial statements in the Spring of 2001. (ER0548; SER0744). Muessle prepared transactions summaries that

Rosenbaum then provided to the SEC. (SER0688). While represented by Rosenbaum, Muessle gave sworn testimony to the SEC about his analysis of these transactions. (SER0743-50). Several of the transactions later appeared in the indictment against Samper.

Rosenbaum sent Muessle's summaries to the SEC voluntarily, i.e., not in response to a subpoena. (ER0245; ER1005). Echavarria in turn provided Muessle's summaries and other documents relating to a purported sale to Raytheon to AUSA Robinson. (ER0245; ER1105). Echavarria wrote in an internal email, "because [the Raytheon invoice] is a totally false sale with admissions from the company that it was a 'duplicate billing' – I predict [Robinson] will be very interested in this transaction." (ER1105). In an internal memorandum dated April 4, 2001, Robinson wrote, "just this week FLIR publicly restated its 1998 earnings, and in the process sent the SEC an explanation admitting to the bogus nature of some of its previously reported sales." (ER1103).

Over the next two years, the USAO and the SEC lawyers continued to secretly build a criminal case. Internal memos established that the USAO continued to believe that the case warranted prosecution and that its strategy was to "piggyback" on the results of the SEC's investigation for the criminal case. (ER1077). The two offices discussed how to establish venue for a false statement prosecution in Oregon, and AUSA Robinson instructed the SEC on how to build a false statement case. (ER1105). Robinson's

successor on the case, AUSA Allen Garten, told the SEC that he was not conducting a parallel criminal investigation, and that if the criminal authorities emerged in a separate parallel proceeding, the discovery flowing to the government would come to an end. (ER1116-18). In October 2001, Samper submitted to a second SEC examination, still represented by Stoel Rives counsel, and unaware of the criminal referral. (ER1160).

f. FLIR'S "Wells Submission" lays blame on Samper

On March 8, 2002, Stoel Rives submitted to the SEC its "Wells Submission" on behalf of FLIR. (SER0802). A Wells Submission is formal filing in which the company under investigation attempts to persuade the SEC not to bring a civil enforcement action. (ER0731-32). Stoel Rives stated that FLIR had fully cooperated with the SEC's investigation and had terminated those responsible for FLIR's problems. "FLIR does not contest that significant accounting errors were made in the 1998 and 1999 fiscal years. However, the problems that existed in those years are the problems of a company that no longer exists." (SER0802). Under new leadership, "the Company has been a model of responsible accounting and management." (SER0802). Counsel described how an audit and the work of a Special Committee revealed accounting problems, and how top executives, including Samper, had been fired or asked to resign. (SER0804).

Stoel Rives also boasted of FLIR's cooperation with the SEC, including voluntarily turning over Muessle's summaries. (SER0810). Stoel Rives concluded that, "to the extent wrong-doing may have occurred, we understand that the SEC is pursuing fraud claims against one or more individuals who may have been responsible" (SER0812), which implicitly included Samper.

Stoel Rives later negotiated a settlement agreement with the SEC, in which FLIR consented to a factual finding that fraudulent revenue recognition practices had occurred in 1998 and 1999. (SER0380-81; SER0890; SER0892). FLIR agreed to a cease and desist order, but faced no other sanction. (SER0901). FLIR was not named as a defendant in the civil action SEC filed against Samper and others in September 2002. (ER1182). Samper settled that case by stipulating to a significant money judgment and an injunction against ever acting as an officer or director of an issuer of securities. (ER1169-74).

g. Rosenbaum tips off the government regarding the Swedish drop shipment

After receiving a copy of the SEC complaint, Rosenbaum told the government about an unsubstantiated accounting entry showing $4.6 million in revenue for a "drop shipment" from FLIR's Swedish facility for the third quarter of 1999 ("Swedish drop shipment"). (ER0431-33; ER0246). Muessle had discovered the entry in November 2000. His discovery

led to a meeting on November 3, 2000, at Stoel Rives, attended by Samper, Muessle, Rosenbaum, and Lisa Kaner (an attorney with Glade's firm). (ER0531-32). At the time of the November 3 meeting, Muessle and Samper were both clients of Rosenbaum. (ER0772). Samper acknowledged his involvement in making the accounting entry, and said that he relied on Stringer for the data. (ER0534; SER0457). Muessle found no documents supporting the entry. (ER0539). He believed that the entry was fraudulent (ER0541), and that Samper and Stringer had made it in order to meet a predetermined revenue goal. (SER0956).

Muessle prepared short memos that included Samper's statements to his attorney about this and another accounting entry. (SER0590-91). Rosenbaum redacted Samper's statements to her from the version she sent to the SEC, claiming that the redacted portions were subject to the attorney/client privilege. On November 27, 2000, Echavarria challenged Rosenbaum's assertion of the privilege. (SER0628). After the December 11, 2000, meeting discussed *supra*, in which FLIR pledged to increase its cooperation with the SEC, Rosenbaum mailed Echavarria a packet of documents that included Muessle's memos about the Swedish drop shipment. (SER0657-59). This time, the memos were not redacted. They revealed Samper's privileged communications. (SER0659).

The SEC did not understand the significance of Muessle's memos until Rosenbaum telephoned Echavarria on September 30, 2002, to express surprise that the SEC's civil complaint against Samper and

others did not allege the Swedish drop shipment as a fraudulent accounting entry. (ER0431). Rosenbaum then identified for the SEC the memos she had previously provided. (ER0431-32). Rosenbaum also identified Arne Almefors, the head of FLIR's Swedish facility, as a witness. (ER0246). The SEC lawyers testified that the SEC was not aware of the Swedish drop shipment entry until Rosenbaum told them about it. (ER0246; ER0432-33). After the USAO finally made its presence known in January of 2003, Rosenbaum continued to facilitate SEC interviews with FLIR employees regarding the Swedish drop shipment which later would be alleged in the indictment as part of a scheme to defraud. (SER1033; SER1036).

h. Stoel Rives continues to represent FLIR and its employees after USAO surfaces

In January of 2003, AUSAs Robinson and Garten met with Rosenbaum, Ellis, FLIR's general counsel Steven Wynne, and Lewis to discuss the pending criminal charges. (ER1025-26). Lewis told AUSA Garten that FLIR would cooperate fully with the criminal proceeding. (ER1026). Wynne understood from the meeting that "the extent of [FLIR's] cooperation with the inquiry would be a factor in determining whether or not the company would be charged." (ER1028).

On February 14, 2003, AUSA Garten wrote a letter to Ellis and Rosenbaum stating, "I want to

emphasize once again that the extent of the company's cooperation will be critical to our final determination about the charges that may be brought." (ER1226). Garten demanded that the company waive the attorney/client privilege for the period 1997 through 2001. He stated, "as we ask for your help in assembling evidence relating to criminal conduct of certain former employees * * * , we do not expect you to interpose any privilege issues regarding any investigation that you undertook for FLIR."

AUSA Garten gave a list of witnesses that he intended to interview. (ER1228). He expected Stoel Rives attorneys or Wynne to advise each person on the list "to fully cooperate with us and hold nothing back." (ER1227). Garten further stated:

> "In this case, Flir seeks immunity from prosecution. In return, we expect that the company to actively assist us [sic] in assembling evidence, by way of documents and testimony, which will allow us to prove the charges and allegations in the SEC complaint, as well as other issues that we will be identifying for you. Our assessment of the extent of the company's cooperation will be a function, in part, of how proactive you are in assisting us with our proof against the former employees identified in the SEC complaint. * * * Based upon [CEO Earl] Lewis' express assurances that the company will do whatever it takes to assist us, I would assume that the ***two of you*** and knowledgeable employees within the company would be

> able to put together the evidence of the obvious fraudulent conduct outlined in the SEC complaint in a rather short time frame." (ER1229) (emphasis added).

Rosenbaum responded by writing "FLIR is committed to fully cooperating in your investigation. In furtherance of this commitment, FLIR has agreed to waive the attorney-client privilege for the period you requested (1997-2001) * * * ." (SER0927). She enclosed the file of another law firm that had conducted an investigation into the accounting allegations in 2000. Those file materials previously had been withheld as privileged. (SER0925). She stated: "Barnes [Ellis] and I want to confirm to you that our intent is to cooperate with your investigation to the full extent permitted by our ethical obligations to other clients that we have represented in connection with the SEC investigation [including Samper]." (SER0927-28).

On February 19, 2003, AUSA Garten sent Ellis and Rosenbaum an e-mail listing the witnesses he wanted to interview, including Muessle, Chambers and Widdows. (ER1232). He stated: "The cooperation of these witnesses will then dictate how we proceed. In accordance with our conversation, I will expect that you will contact all of these witnesses, tell them of the nature of the investigation, and the imperative to cooperate fully." Garten stated that he was "somewhat concerned" about Stoel Rives' conflict of interest in having represented Samper, adding "I leave this conflict issue up to you."

On February 20, 2003, Rosenbaum wrote to Glade about her contact with the USAO. (SER0949A). Rosenbaum did not tell Glade that FLIR was seeking immunity from prosecution. (SER1062). In fact, Rosenbaum told Glade that Garten told her that "the Company is not a focus of his investigation." (SER0949A). Glade was not aware that Garten had asked Stoel Rives for assistance in developing evidence against Samper. (SER1062).

On March 5, 2003, Rosenbaum wrote Samper and Glade to say that Stoel Rives would continue to represent FLIR in the criminal investigation, but that it would not represent any individuals. (ER1234). Rosenbaum told Samper that her representation of FLIR would be limited to advising FLIR and assisting it in "producing documents and arranging for witnesses to be interviewed by the DOJ."

Rosenbaum asked for Samper's consent that Stoel Rives continue to represent the corporation, in light of what she now identified as a conflict of interest. She wrote: "Our role will be limited because we will not represent any witnesses or be present when any witnesses are interviewed by the DOJ." (ER1235). Samper consented to Stoel Rives' continued representation of FLIR, based on the understanding that Stoel Rives' representation of FLIR was limited to assisting in document production and scheduling witness interviews, and that Stoel Rives would not take any action to compromise Samper's interests. (ER1237).

Rosenbaum did not limit her representation to FLIR. She continued to represent more than a dozen FLIR employees, including Muessle and Chambers, who were cooperating with the SEC and the USAO. (SER1032; SER1040-41). Also, Rosenbaum did not tell Samper or Glade that she already had disclosed confidential and damaging information to the government regarding the Swedish drop shipment.

The SEC continued to actively assist the USAO in building a criminal case against Samper and the other defendants. (ER0496-0507; SER1027-28; SER0978-79; SER0983-89). Stoel Rives knew that information developed in the SEC investigation would be turned over to the criminal investigators. (SER0386-86A). Muessle, while represented by Stoel Rives, continued throughout 2003 to assist the USAO with analysis of past transactions. (ER1029; SER0430-57). The grand jury issued its indictment in September 2003.

II. The District Court's Ruling

Defendants filed motions to dismiss the indictment on the grounds of outrageous government conduct and a Due Process violation in the way the SEC and the USAO hid the criminal investigation from view in order to prevent defendants from asserting their Fifth Amendment right against self-incrimination. Samper also moved separately to dismiss the indictment on the ground of a Due Process violation, alleging that the government exploited

a conflict of interest that existed by virtue of his lawyer's representation of FLIR and its employees who were cooperating with the investigation.

Following eleven days of testimony, the district court granted the motions to dismiss. The district court rejected the government's contention that the use of "parallel proceedings" in this case was approved by the Supreme Court's decision in *United States v. Kordel*, 397 U.S. 1 (1970). The district court concluded that the SEC and the USAO did not pursue separate, parallel investigations. (App. 38). Rather, the two agencies agreed that the presence of the criminal law enforcement would remain hidden behind the SEC's investigation so that the defendants would not invoke their constitutional right against self-incrimination. (App. 38). The district court ruled that "[t]he strategy to conceal the criminal investigation from defendants was an abuse of the investigative process." (App. 39-40). The district court further found that, in light of the active role the USAO played in the SEC investigation and defendants' early status as "targets" or "subjects" of a criminal prosecution, the SEC's Form 1662 was insufficient to warn the defendants of their criminal exposure. (App. 40).

In addition, the district court ruled that dismissal of the indictment was appropriate on the ground that the government had engaged in trickery and deceit in hiding the criminal investigation. (App. 42). The district court found that the government had instructed court reporters in the SEC investigation not to tell Samper's lawyer about the U.S. Attorney's

involvement, and strategically kept a prosecutor away from the SEC's interviews for fear that his presence would reveal the criminal investigation. (App. 42). The district court found that Echavarria misled defendant Stringer and his lawyer into believing that he was not a target of a criminal investigation and evaded questions about the USAO's involvement. (App. 42). The government's strategy was to obtain evidence from the defendants and sidestep their constitutional rights. The district court found that this conduct was "so grossly shocking and so outrageous as to violate the universal sense of justice." (App. 42). The court further ruled that, if the Ninth Circuit were to determine that dismissal of the indictment was in error, defendants' statements in the SEC investigation would be suppressed. (App. 43).

The district court also granted Samper's motion to dismiss based on the government's exploitation of his lawyer's conflict of interest. (App. 50). The district court found that "[t]he government was the only party involved who knew the degree of the conflict of interest in having Rosenbaum represent Samper, FLIR and the other witnesses." (App. 48). Under these circumstances, the district court ruled that the government should have moved for disqualification of counsel. (App. 49).

The district court further found that "the government took advantage of counsel's conflict of interest and obtained information it might not have otherwise received." (App. 49). The court found that

the government learned about the Swedish drop shipment only after Rosenbaum told the SEC about it to assist in FLIR's show of cooperation. "The evidence relating to the Swedish drop shipment was improperly obtained by the government." (App. 49). The district court dismissed the indictment against Samper, and alternatively ruled that, should the Ninth Circuit find that remedy to be in error, Samper's statements and evidence of the Swedish drop shipment must be suppressed. (App. 49-50).

III. The Ninth Circuit Opinion

Following the government's appeal, the Ninth Circuit vacated the judgment of dismissal, reversed the suppression rulings, and remanded for further proceedings. Although the Ninth Circuit stated that it accepted the district court's factual findings under a clear error standard of review (App. 5), a fair reading of the opinion reveals that the Ninth Circuit's view of the facts was very different from that of the district court judge who had the opportunity to assess first-hand the credibility of the government's witnesses.

For example, despite the district court's central finding that the SEC and USAO did not conduct "parallel proceedings," the Ninth Circuit assumed the investigations were "parallel," and invoked *Kordel* as upholding parallel criminal and civil proceedings. (App. 15). The panel further held that the defendants waived their Fifth Amendment right by submitting to the SEC interviews, having first been warned by

Form 1662 that the SEC could share information with the U.S. Attorney. (App. 19). The Court further noted that the defendants had been told before their statements under oath that the facts developed in the investigation might constitute violations of criminal laws. (App. 19). The Court held that, by failing to invoke their privilege against self-incrimination, the defendants forfeited any claim that the use of their testimony against them in the criminal proceeding violated the privilege. (App. 19).

The Ninth Circuit also rejected defendants' claim of "trickery and deceit," holding that the SEC made no affirmative misrepresentations regarding the existence of a criminal proceeding. (App. 25). The Court acknowledged that the SEC's conduct "indicate[d] an intent to prevent disclosure to defendants of the actual criminal investigation," but stated that the possibility of a criminal investigation should have been known to the defendants and their counsel. (App. 26).

Finally, with respect to Samper's claim arising out of his lawyer's conflict of interest, the Ninth Circuit held that the government did not deliberately interfere with Samper's relationship with his lawyer. (App. 28). Therefore, it held that the district court erred in suppressing evidence of the Swedish drop shipment.

SUMMARY OF REASONS FOR GRANTING REVIEW

This case presents the Court with an opportunity to expound upon fundamental principles of Due Process that arise when a U.S. Attorney's office, with a target for prosecution clearly in its sights, hides behind what appears to be a purely civil investigation in order to prevent that target from invoking his constitutional right against self-incrimination. In *Kordel*, this Court stated that a failure to advise a person in a civil investigation that he was also the target of a criminal investigation could constitute a Due Process violation. The Ninth Circuit here glossed over that passage from *Kordel*, and held that an "intent to prevent disclosure to defendants of the actual criminal investigation," was insufficient to establish a Due Process violation, as long as the government did not make any "affirmative misrepresentations." Here, the government did affirmatively mislead the defendants regarding the existence of a criminal investigation. Furthermore, in light of the importance of the Fifth Amendment right against self-incrimination and the grave circumstance that the defendants unwittingly faced during the SEC investigation, the difference between actions showing an "intent to prevent disclosure" of a criminal investigation on the one hand, and "affirmative misrepresentations" on the other hand, is far too fine a distinction to determine the outcome.

Concealing the criminal investigation from Samper was particularly outrageous because his

attorney represented FLIR and its employees who were cooperating with the government and incriminating him. As discussed *infra*, FLIR's cooperation resulted from government policy designed to encourage corporations to turn against employees deemed responsible for wrongdoing. The government exploited Samper's attorney's conflict of interest by pressuring her to cooperate and bring forth witnesses to implicate Samper, knowing that she also would advise Samper to cooperate in order to serve FLIR's interest.

A client's relationship of trust with his attorney is a cornerstone of our legal system, particularly when the adversary has the power and reach of the federal government. It is fundamentally unfair for the government to engage in a covert criminal investigation when the government knows that the targeted person's lawyer is also representing a cooperating party. The government's conduct here was the sort of circumstance contemplated by *Kordel* that calls for dismissal. The government had a duty either to inform Samper of his status as a target of a criminal investigation, thereby informing him of the full nature of the conflict, or to seek to disqualify the conflicted counsel from further representation. By doing neither one, the government violated his Fifth Amendment right to Due Process.

This Court has not addressed similar issues since the *Kordel* decision 28 years ago. As the government increases its enforcement of white collar offenses, the time is right for this Court to provide guidance to

U.S. Attorneys, civil enforcement agencies, and the lower courts regarding the proper conduct of joint civil and criminal investigations so that they do not violate the constitutional rights of the individuals under investigation. As civil enforcement agencies bear down on those suspected of committing various forms of corporate, accounting, and financial fraud, questions will inevitably arise regarding the government's duty to advise targets of a pending criminal investigation before compelling their statements through its subpoena power. To vindicate these important constitutional rights, the Court should confirm a rule of transparency with regard to simultaneous government investigations.

ARGUMENT

I. The Supreme Court Should Reaffirm The Principle Established In *Kordel* That The Failure To Warn A Target Of A Civil Investigation That He Is Also A Target Of A Criminal Investigation Constitutes A Due Process Violation

The Fifth Amendment to the United States Constitution provides that "No person shall * * * be deprived of life, liberty, or property without due process of law." "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941). In *United States v. Kordel*, 397 U.S. 1 (1970), the

Supreme Court held that the government did not violate due process by proceeding with a criminal prosecution after the target had responded to interrogatories in the course of a civil investigation. The case is widely cited for the proposition that the government may pursue parallel civil and criminal investigations. But the critical fact in *Kordel* that is missing here was that the defendants were warned before they responded to the interrogatories that the agency contemplated a criminal proceeding against them.

The Court held:

> "We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution or *has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution*; nor with a case where the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or other unfair injury; nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution." *Kordel*, 397 U.S. at 11-12 (emphasis added; footnotes omitted).

In the present case, we deal with precisely the scenario described in *Kordel* that crossed the line into government misconduct: a failure to advise Samper that it contemplated his criminal prosecution. The Ninth Circuit relied on Form 1662 which states that

information obtained in the SEC investigation could be shared with the U.S. Attorney. However, according to *Kordel*, the conduct that violates Due Process is a failure to advise a person in a civil proceeding that the government specifically contemplates a criminal prosecution against him, not a failure to advise that information may be shared with the U.S. Attorney or that a criminal prosecution is a hypothetical possibility. Because the government had already targeted Samper for a criminal prosecution, the boilerplate advice in Form 1662 was insufficient to warn him of the peril of providing sworn testimony to the SEC.

The form is written in general terms and states that the SEC "may" provide records of the investigation to other agencies. The word "may" connotes the scope of SEC's permissive use of information, and advises only of the possibility of some future action. The form states that the SEC often makes its files available to the U.S. Attorney, and that "[t]here is a likelihood that information supplied by you will be made available to such agencies where appropriate." But the standard warning that information might be shared with the U.S. Attorney was quite different from the reality hidden from petitioner's view: that he already was targeted for criminal prosecution, and the SEC was working hand-in-hand with the U.S. Attorney to gather evidence to support a criminal prosecution. *See United States v. Thayer*, 214 F. Supp. 929, 933 (D. Colo. 1963) ("the giving of a warning can not have much significance where the defendant was, so to speak, then within the sights of the Government

and did not receive an explanation of the true import of the * * * inquiry"). The cover letter sent with the Form 1662 helped obscure that reality by telling petitioner that "[t]he investigation and the subpoena do not mean that we have concluded that you or anyone else has broken the law. Also, the investigation does not mean that we have a negative opinion of any person * * * ." (ER1043). That was not true: the SEC had already determined that Samper had broken the law and made a criminal referral to the USAO.

Having received a subpoena, along with this cover letter and Form 1662, a target is faced with a choice whether to assert his Fifth Amendment privilege. If he asserts the privilege, his ability to defend himself in the civil proceeding is substantially impaired. His refusal to answer questions may be used against him; and the foreseeable result is financial ruin through forfeiture, penalties and assessments. On the other hand, the risk of waiving the privilege is speculative and hypothetical, and, therefore, difficult to quantify. A target might reasonably conclude that by cooperating with the SEC, he minimizes the risk of a criminal referral.

It was that dynamic that the government exploited in this case. Early in the investigation, the USAO and the SEC specifically agreed that the USAO would not conduct its own "overt" investigation because that would cause defendants to assert their Fifth Amendment privilege and would stop the free flow of information in support of the criminal

prosecution. The SEC instructed a court reporter not to tell Samper's lawyer about the USAO's involvement. The SEC dodged questions about whether the defendants were targets of a criminal investigation. The SEC schemed to keep the prosecutor out of meetings with petitioner's attorney. The record amply supports the district court's finding of a deliberate plan to hide from the defendants their true status as targets. Thus, the government cannot rely on the Form 1662 warnings, when it employed a countervailing strategy to keep Samper in the dark.

As the Ninth Circuit noted, the Supreme Court has not had occasion to address the issues raised in the passage quoted from *Kordel*, *supra*, in 28 years. (App. 16). The Ninth Circuit's decision in this case likely will have a significant impact on how federal agencies conduct civil investigations in conjunction with U.S. Attorneys. It sets a bad precedent for allowing criminal law enforcement agencies to hide behind the guise of a purely civil investigation to gather incriminating statements from targets. Petitioner respectfully submits that this is not what the Supreme Court in *Kordel* intended, and for that reason, the Court should allow the petition and reaffirm the principles laid out in *Kordel*.

II. The Government Violated Petitioner's Right To Due Process When It Exploited His Lawyer's Actual Conflict Of Interest

The government's failure to advise Samper that he was the target of a criminal investigation when it sought his testimony was particularly egregious because his attorney, Rosenbaum, represented FLIR and its employees who incriminated Samper. Only the SEC knew about the USAO's involvement in the case, and, therefore, only the SEC knew the full extent of the conflict.

As discussed, the facts of this case fall squarely within the scenario constituting a Due Process violation where the government "has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution." *Kordel*, 397 U.S. at 12-13. The *Kordel* Court also described the circumstance in which the defendant was "without counsel" during the civil investigation as potentially giving rise to a Due Process concern. Here, petitioner was not "without counsel" during the SEC investigation; but he was represented by conflicted counsel. This Court has held in the Sixth Amendment context that a defendant is presumed to have satisfied the "prejudice" prong of a claim of ineffective assistance of counsel when counsel is burdened by an actual conflict of interest that affects her performance. *Strickland v. Washington*, 466 U.S. 668, 692 (1984). The thrust of that holding is that when a person is represented by counsel whose loyalties lie elsewhere, the person is effectively "without counsel." The prejudice is

particularly apparent when the conflict results in the attorney advising the client, contrary to his interest, to waive his right against self-incrimination. Thus, this other scenario described in *Kordel* is implicated by the circumstances in this case, as is the last catch-all provision.

Furthermore, the particular "conflict" that arose here was the direct result of the government's own policies regarding corporate criminal liability. In June of 1999, the Attorney General issued the "Holder Memorandum" describing the factors prosecutors must consider when deciding whether to criminally prosecute corporations. (SER0458). The Holder Memorandum was in effect at the time of the joint SEC/USAO investigation in this case. It has taken on different names in the intervening years, and has been amended in some respects.[3] However, the core policy of encouraging corporations to avoid criminal liability by cooperating fully with the government against employees it deems culpable remains the same. The Holder Memorandum states: "In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including

---

[3] The Holder Memorandum became the Thompson Memorandum and then the McNulty Memorandum, named after succeeding Deputy Attorney Generals. The current iteration of the Justice Department's policies regarding corporate criminal liability is "Principles of Federal Prosecution of Business Organizations," found at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

senior executives, to make witnesses available, to disclose the complete results of its internal investigation, * * * . [A] corporation's cooperation may be critical in identifying the culprits and locating relevant evidence." (SER0465-66).

SEC policy also encourages corporations to turn against employees accused of misconduct in order to avoid a civil sanction. (SER0795-97). Rosenbuam testified that the SEC gives weight to the corporation's cooperation when deciding whether to initiate an enforcement action. (ER0741). In fact, Stoel Rives' Wells Submission for FLIR impressed the SEC with the fact that FLIR had fully cooperated with the government, including voluntarily turning over documents and waiving the attorney-client privilege. (SER0810).

The inherent conflict between a corporation and its employees is implicit in *United States v. Stein*, 541 F.3d 130 (2nd Cir. 2008), in which the Second Circuit held that the government violated the Sixth Amendment right to counsel of targeted employees of accounting firm KPMG, when the government used the Thompson Memorandum (a subsequent version of the Holder Memorandum) to pressure KPMG into cutting off the payment of attorney fees for employees who did not cooperate with the government's investigation. The Thompson Memorandum provided that the prosecutor may consider a corporation's payment of a culpable party's attorney fees in weighing the corporation's cooperation. The Second Circuit held that the government crossed the line in recruiting the

corporation to pressure its employees into cooperating by affecting their access to counsel. *Id.* at 157-58.

In the wake of *Stein* and pressure from Congress, the Department of Justice has amended its policies to prohibit prosecutors from requiring that corporations waive the attorney/client privilege or work product protections, and has clarified its position with regard to corporations that advance legal fees to employees.[4] Yet the overarching policy regarding corporate criminal liability remains the same, and therefore, the conflict that exists between a corporation and a targeted employee is no less extant today than it was at the time of the Holder Memorandum. The district court in *Stein* was particularly disturbed by the government's exploitation of the conflict between KPMG's interests and those of its employees. *United States v. Stein*, 435 F. Supp.2d 330, 345 n.54 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2nd Cir. 2008).

As one commentator has described the problem:

> "[T]he government effectively is deputizing 'Corporate America' as an arm of law enforcement at the expense of principles that lie at the core of our adversarial system of justice. As a result, a wedge has been driven between senior management and other employees as corporations rush to meet the

---

[4] See also Paul J. McNulty, "Against Backdrop in Setback in KPMG Case, Feds Revise McNulty Memo," 23 No. 1 Andrews White-Collar Crime Reporter, 2 (Sept. 29, 2008).

> requests of federal prosecutors for 'cooperation.'" David M. Zornow, "On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations," 37 *Am. Crim. L. Rev.* 147 (Spring, 2000).[5]

The government is fully aware of this adversarial relationship between the corporation and the targeted employee. Here, it exploited that conflict by allowing Rosenbaum to continue as petitioner's lawyer, knowing that she would counsel petitioner to waive his Fifth Amendment right against self-incrimination and cooperate fully with the investigation thereby serving the interest of FLIR. Samper was in the USAO's sights for criminal prosecution in June of 2000. In October 2000, the SEC and USAO specifically discussed Stoel Rives' multiple representation and considered issuing grand jury subpoenas which would have caused Stoel Rives' clients to seek separate counsel. (ER0448, ER0450). The USAO chose not to issue grand jury subpoenas because FLIR started cooperating and the defendants agreed to provide testimony to the SEC. (ER0568). The USAO consciously chose not to surface so as not to jeopardize the SEC's ability to obtain statements from Samper. (ER1083). The government knew that Samper would have asserted the Fifth Amendment

---

[5] See also N. Richard Janis, "Taking the Stand – Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice is Being Destroyed," D.C. Bar Journal, March 2005.

privilege if he knew that he was the target of a criminal investigation, so it hid that fact.

The USAO took interest in Samper's sworn testimony in October 2000 as it continued to monitor the SEC investigation and plan for a criminal prosecution. (ER1077; ER1084). The USAO gave instructions to the SEC on how to develop a false statement case against Samper. (ER1103). After Rosenbaum voluntarily provided Muessle's transaction summaries to the SEC, Echavarria provided them to AUSA Robinson to develop fraud allegations against Samper. (ER1105; ER0245). The USAO and the SEC discussed Samper's testimony about specific transactions and how the evidence implicated him. (ER1077; ER1105; ER1084). Before Samper's testimony in October 2001, the USAO told the SEC lawyers the type of evidence needed to support a criminal indictment. (SER0781). They discussed how this round of interviews would be more confrontational. (ER1132). They discussed how Samper might not settle with the SEC if he knew the USAO was involved in the investigation. (ER1117). The SEC and USAO repeatedly discussed strategy on multiple issues leading up to the indictment. In addition, acting under pressure from the SEC, Rosenbaum divulged privileged communications regarding the "Swedish drop shipment," and then later, to serve the interest of FLIR, again brought this transaction to the attention of the government. Under these circumstances, the government owed Samper a duty to inform him of the conflict,

rather than to exploit it by leveraging Rosenbaum's divided loyalties.

The government has argued that the SEC warned petitioner about the conflict of interest in Echavarria's July 19, 2000, letter to Rosenbaum, in which she wrote "it is far too early in the investigation for SEC staff to identify people who may possess liability." (ER1058). That was not true. By this time, the SEC and the USAO had targeted Samper and others for a criminal prosecution. By omitting the fact that Samper was squarely in the government's sights for a criminal prosecution, and by lulling Samper into thinking that the SEC had not yet drawn any conclusions regarding liability, the government prevented Samper from understanding the true nature of the conflict in having his lawyer continue to advise him to cooperate. Moreover, the SEC thereafter did not issue any further warnings about the conflict of interest, despite the fact that FLIR pledged to increase its cooperation with the SEC investigation, and its employees, represented by Rosenbaum, continued to provide incriminating evidence against Samper. Under these circumstances, the Ninth Circuit erred in holding that the SEC adequately warned Samper of the conflict.

The Ninth Circuit held that the government did not cause Rosenbaum to breach her ethical obligations by turning over evidence of the "Swedish drop shipment" and did not interfere with the attorney-client relationship. (App. 28-29). The Court applied a three-part test from *United States v. Haynes*, 216 F.3d

789 (9th Cir. 2000), for determining government misconduct based on a deliberate intrusion into the attorney-client relationship. Petitioner contends that this test was inapposite for the circumstances of this case. The government did not hire an informant to listen in on privileged communications, and did not overtly recruit Rosenbaum to spy on her client. It did not need to. The SEC knew that Rosenbaum was championing FLIR's efforts to cooperate and that she likewise would advise Samper to cooperate. The government's strategic choice not to disclose the criminal investigation to Samper served the same invidious purpose as a physical intrusion into the defense camp.

If the conflict had arisen post-indictment, there is no question that the Sixth Amendment right to counsel would have required the government to bring the conflict to the attention of the court in order to disqualify the attorney. *See United States v. Tatum*, 943 F.2d 370, 379-80 (4th Cir. 1991) (government must bring conflict of interest to court's attention or move for disqualification of counsel), *citing United States v. Agurs*, 427 U.S. 97, 1210-11 (1976). The result should be no different pre-indictment under a Due Process analysis, when the government knows that the client will be prosecuted. *See United States v. Irwin*, 612 F.2d 1182, 1185 (9th Cir. 1980) (government's pre-indictment interference with attorney/client relationship may render performance so ineffective as to violate Due Process). *See also SEC v. Higashi*, 359 F.2d 550, 553 (9th Cir. 1966) (noting

that multiple representation is allowed in SEC proceeding only when there is no conflict of interest); *Kentucky West Virginia Gas Co. v. Pennsylvania PUC*, 837 F.2d 600, 618 (3rd Cir. 1988) (discussing *Higashi* and disqualification of counsel).

The question presented is critically important to how civil enforcement agencies investigate conduct that also violates criminal laws. Multiple representation is not uncommon in civil investigations, and therefore, the conflict of interest that arose here is likely to recur, particularly if the government adopts a strategy of keeping the target of a criminal investigation in the dark as to his true status in order to reap the benefits of his lawyer's divided loyalties. This strategy is contrary to the principles of fairness outlined in *Kordel*. If allowed to stand, the government's conduct will eviscerate fundamental rights to Due Process and against self-incrimination.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

PER C. OLSON, OSB #93386
Counsel of Record
RONALD H. HOEVET
HOEVET, BOISE & OLSON, P.C.
1000 S.W. Broadway, Suite 1500
Portland, Oregon 97205
(503) 228-0497

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant*, v. J. KENNETH STRINGER, III; J. MARK SAMPER; WILLIAM N. MARTIN, *Defendants-Appellees.*	No. 06-30100 D.C. No. CR-03-00432-ALH ORDER AMENDING OPINION AND AMENDED OPINION

Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, District Judge, Presiding

Argued and Submitted
September 26, 2007 – Portland, Oregon

Filed April 4, 2008
Amended July 31, 2008

Before: Mary M. Schroeder, Barry G. Silverman and Jay S. Bybee, Circuit Judges.

Opinion by Judge Schroeder

COUNSEL

Karin J. Immergut, United States Attorney; Hannah Horsley, Assistant United States Attorney; and Kelly A. Zusman, Assistant United States Attorney, Portland, Oregon, for plaintiff-appellant United States of America.

Janet Lee Hoffman, Hoffman Angeli LLP, Portland, Oregon, for defendant-appellee J. Kenneth Stringer, III.

Ronald H. Hoevet, Hoevet, Boise & Olson, P.C., Portland, Oregon, for defendant-appellee Mark Samper.

John S. Ransom and Kendra Matthews, Ransom Blackman LLP, Portland, Oregon, for defendant-appellee William Martin.

ORDER

The opinion in this matter filed on April 4, 2008, and published at *United States v. Stringer*, 521 F.3d 1189 (9th Cir. 2008), is amended as follows:

On slip op. 3549, replace the listed counsel, lines 3-10, with the following:

> Karin J. Immergut, United States Attorney; Hannah Horsley, Assistant United States Attorney; and Kelly A. Zusman, Assistant United States Attorney, Portland, Oregon, for plaintiff-appellant United States of America.
>
> Janet Lee Hoffman, Hoffman Angeli LLP, Portland, Oregon, for defendant-appellee J. Kenneth Stringer, III.
>
> Ronald H. Hoevet, Hoevet, Boise & Olson, P.C., Portland, Oregon, for defendant-appellee Mark Samper.

John S. Ransom and Kendra Matthews, Ransom Blackman LLP, Portland, Oregon, for defendant-appellee William Martin.

On slip op. 3550, replace the first full paragraph with the following:

> Accepting the district court's factual findings under the clear error standard, we hold that the government's conduct does not amount to a constitutional violation under either the Fourth or Fifth Amendments. We vacate the dismissal of the indictments because in a standard form it sent to the defendants, the government fully disclosed the possibility that information received in the course of the civil investigation could be used for criminal proceedings. There was no deceit; rather, at most, there was a government decision not to conduct the criminal investigation openly, a decision we hold the government was free to make. There is nothing improper about the government undertaking simultaneous criminal and civil investigations, and nothing in the government's actual conduct of those investigations amounted to deceit or an affirmative misrepresentation justifying the rare sanction of dismissal of criminal charges or suppression of evidence received in the course of the investigations.

On slip op. 3556, replace the last sentence of the second paragraph with the following:

> Rosenbaum represented Meussle, as well as Samper and FLIR.

On slip op. 3559, replace the citation sentence in the first partial paragraph with the following:

> *See, e.g., United States v. Carriles,* 486 F. Supp. 2d 599, 615, 619 (W.D. Tex. 2007), *appeal pending,* No. 07-50737 (5th Cir.); *United States v. Rand,* 308 F. Supp. 1231, 1233, 1237 (N.D. Ohio 1970).

On slip op. 3568, insert the following as the first full paragraph:

> The panel shall retain jurisdiction over any subsequent appeal in this matter.

Defendant-Appellee Martin's Petition for Rehearing En Banc, Defendant-Appellee Stringer's Petition for Rehearing and Suggestion for Rehearing En Banc, and Defendant-Appellee Samper's Petition for Rehearing En Banc are denied. No subsequent petition for rehearing or rehearing en banc may be filed.

OPINION

SCHROEDER, Circuit Judge:

I. Introduction

The United States appeals from a final order of the district court dismissing criminal indictments against three individual defendants charging counts of criminal securities violations. The dismissal was premised on the district court's conclusion that the government had engaged in deceitful conduct, in

violation of defendants' due process rights, by simultaneously pursuing civil and criminal investigations of defendants' alleged falsification of the financial records of their high-tech camera sales company. Foreseeing the possibility of an appeal, the district court held that the indictments must be dismissed, but ruled in the alternative that, should there be a criminal trial, all evidence provided by the individual defendants in response to Securities and Exchange Commission ("SEC") subpoenas should be suppressed. *See United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006).

The court also suppressed evidence relating to the "Swedish Drop Shipment," an allegedly fraudulent accounting entry. The district court reasoned that the government had improperly interfered with, or intruded into, the attorney-client relationship of one of the defendants by accepting incriminating evidence about the entry from a defense attorney. The attorney had an apparent conflict of interest because she represented the corporation as well as an individual defendant.

Accepting the district court's factual findings under the clear error standard, we hold that the government's conduct does not amount to a constitutional violation under either the Fourth or Fifth Amendments. We vacate the dismissal of the indictments because in a standard form it sent to the defendants, the government fully disclosed the possibility that information received in the course of the civil investigation could be used for criminal

proceedings. There was no deceit; rather, at most, there was a government decision not to conduct the criminal investigation openly, a decision we hold the government was free to make. There is nothing improper about the government undertaking simultaneous criminal and civil investigations, and nothing in the government's actual conduct of those investigations amounted to deceit or an affirmative misrepresentation justifying the rare sanction of dismissal of criminal charges or suppression of evidence received in the course of the investigations.

We also reverse the order excluding evidence received from the conflicted attorney. We do so because the government advised the attorney of the existence of a potential conflict and did not interfere with the attorney-client relationship.

II. Background

A. The concurrent SEC civil and U.S. Attorney criminal investigations

Prior to the criminal action that forms the basis of this appeal, the SEC began investigating the defendants, J. Kenneth Stringer, III, J. Mark Samper, and William N. Martin, and their company for possible civil securities fraud violations. The company was FLIR Systems, Inc. ("FLIR"), an Oregon corporation headquartered in Portland that sells infrared and heat-sensing cameras for military and industrial use. The SEC began the investigation on June 8, 2000. About two weeks later, the SEC held the first of a

series of meetings with the Oregon United States Attorney's Office ("USAO") to coordinate the ongoing SEC investigation with a possible criminal investigation. An SEC Assistant Director and an SEC Staff Attorney met with the supervisor of the white collar crime section of the USAO to discuss the possibility of opening a criminal investigation. The meeting apparently convinced the USAO supervisor to investigate. Within days, the USAO and the Federal Bureau of Investigation ("FBI") opened a criminal investigation.

Federal securities laws authorize the SEC to transmit evidence it has gathered to the USAO to facilitate a criminal investigation by the USAO. *See* 15 U.S.C. §§ 77t(b), 78u(d). To gather evidence for its criminal investigation, the Oregon USAO in June of 2000 sent a letter to the SEC (the "Access Letter") requesting access to the SEC's non-public investigative files, and the SEC promptly granted access.

The civil and criminal investigations proceeded in tandem and the SEC continued to meet and communicate with the USAO and FBI. The SEC turned over documents the SEC collected through its civil investigation.

At the beginning of the criminal investigation, the USAO identified two of the three defendants, FLIR's former CEO, Stringer, and former CFO, Samper, as possible targets, and named them in the USAO's Access Letter to the SEC. A few months later, in October 2000, the Assistant United States Attorney ("AUSA") assigned to the case made a list of the

subjects of the investigation and placed asterisks and the comment "knew what [was] going on" next to the entries for Samper and Stringer. A month later, the AUSA stated in his handwritten notes that Stringer had "lied [about] his role in" the company. In April 2001, an e-mail from the SEC Staff Attorney to the SEC Assistant Director stated the AUSA "define[d] [the] targets as Ken Stringer and Mark Samper."

The district court concluded that the third defendant, Martin, former VP of Sales, was also an early potential target of the criminal investigation. Martin appears on the AUSA's early list of the subjects of the investigation above the comment "knew pushing up sales." During a January 2001 meeting, the SEC advised the USAO and FBI that FLIR was blaming Stringer and Martin for the fraudulent conduct at the heart of the investigation.

Early in the criminal investigation, the USAO decided the investigation should remain confidential. At an October 2000 meeting between the SEC, USAO, and FBI, the AUSA advised that the evidence collected by the SEC might support criminal wire fraud charges. Nonetheless, an internal FBI memo issued in late October stated that the AUSA had concluded, based on the defendants' cooperation with the SEC at that point, that the SEC should investigate "without the assistance or inclusion of the FBI." At the January 2001 meeting between the SEC, FBI, and USAO, the SEC revealed that FLIR was cooperative and was providing evidence that was damaging to Stringer and Martin.

By June 2001, the USAO was not yet ready to convene a grand jury and issue indictments. The SEC and USAO believed that FLIR and defendant Samper would settle with the SEC so long as the U.S. Attorney was not directly involved. During a December 2001 phone conversation between the AUSA assigned to the case and the SEC Assistant Director, the AUSA continued to believe it was "premature [sic] to surface" and that the presence of an AUSA would "impede" a meeting between the SEC and defendants. During a December 2002 phone call, the SEC and USAO decided that the USAO would not "surface", i.e., convene a grand jury and issue indictments, until the "end of Jan/early Feb" 2003.

The SEC facilitated the criminal investigation in a number of ways. The SEC offered to conduct the interviews of defendants so as to create "the best record possible" in support of "false statement cases" against them, and the AUSA instructed the SEC Staff Attorney on how best to do that. The AUSA asked the relevant SEC office, located in Los Angeles, to take the depositions in Oregon so that the Portland Office of the USAO would have venue over any false statements case that might arise from the depositions, and the SEC did so. Both the SEC and USAO wanted the existence of the criminal investigation kept confidential. The SEC Staff Attorney, at one of the Portland depositions, made a note that she wanted to "make sure [the] court reporters won't tell [FLIR's Attorney]" that there was an AUSA assigned to the case.

The SEC, however, did not hide from the defendants the possibility – even likelihood – of such an investigation. The SEC sent each of the defendants subpoenas in the summer of 2001, and attached to each was Form 1662, a form sent to all witnesses subpoenaed to testify before the SEC. Under the header "Routine Uses of Information," the four-page form states that "[t]he Commission often makes its files available to other governmental agencies, particularly the United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate."

Form 1662 also advises witnesses of their Fifth Amendment rights. After the heading "Fifth Amendment and Voluntary Testimony," the form states that:

> Information you give may be used against you in any federal . . . civil or criminal proceeding brought by the Commission of any other agency. You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment of the Constitution of the United States, to give any information that may tend to incriminate you or subject you to fine, penalty, or forfeiture.

None of the defendants invoked his right against self-incrimination during his deposition, and all proceeded to testify in compliance with the subpoena. Each of the defendants was represented by counsel when he testified.

During the course of Stringer's deposition, taken in Portland in October 2001, Stringer's attorney actually questioned the SEC Staff Attorney about the involvement of the USAO. In response to those questions, the SEC Staff Attorney answered as follows:

> MR. MARTSON: My first question is whether Mr. Stringer is a target of any aspect of the investigation being conducted by the SEC.
>
> STAFF ATTORNEY: The SEC does not have targets in this investigation.
>
> MR. MARTSON: The other questions I have relate to whether or not, in connection with your investigation, the SEC is working in conjunction with any other department of the United States, such as the U.S. Attorney's Office in any jurisdiction, or the Department of Justice.
>
> STAFF ATTORNEY: As laid out in the 1662 form, in the "routine use of" section there are routine uses of our investigation, and it is the agency's policy not to respond to questions like that, but instead, to direct you to the other agencies you mentioned.
>
> MR. MARTSON: And which U.S. Attorney's Office might I inquire into?
>
> STAFF ATTORNEY: That would be a matter up to your discretion.

The record does not show the SEC did anything to impede an inquiry, nor does it disclose that any

inquiry was made. The record reflects that the government never furnished defendants with any false information concerning the existence of a criminal investigation.

In September 2002, a year before the criminal indictments, defendants Samper and Martin entered into consent decrees in the civil action, agreeing to pay penalties, disgorgement, and pre-judgment interest.

B. The "Swedish Drop Shipment" evidence from the attorney jointly representing defendants

Throughout the course of the SEC investigation, FLIR was represented by attorney Lois Rosenbaum. Defendant Samper, FLIR's former CFO, had retained separate counsel. In March 2000, Rosenbaum sent Samper a letter offering to jointly represent FLIR, Stringer, and Samper. In the letter, Rosenbaum claimed that based on her "present knowledge of the facts," she did not anticipate that any conflicts would arise between the co-clients. The letter, however, advised the clients to consult separate counsel before consenting to the joint representation and promised immediately to inform the clients if a conflict did arise.

Samper's separate counsel sent a letter to Rosenbaum stating that Samper consented to the "joint representation in spite of the potential conflict of interest that may arise between the clients." Samper's

separate counsel continued to represent him as monitoring counsel.

On June 30, 2000, the SEC sent Samper a subpoena with Form 1662 enclosed. It warned of possible dangers of joint representation. The form advised that "[y]ou may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's."

In July 2000, when the SEC learned that Rosenbaum was representing FLIR and its employees, it immediately sent her a letter warning of the specific dangers of this co-representation. "We are concerned that the broad range of interests possessed by your many clients cannot be adequately represented by a single attorney." The letter specifically pointed out the potential conflict of interest in representing a company under investigation by the SEC and upper level management who may have civil liability. The letter stated that, "Although it is far too early in the investigation for the SEC staff to identify people who may possess liability, we are troubled by the scope and breadth of your representation." Rosenbaum continued to represent both FLIR and Samper, among others.

One of the eventual charges in the indictment was that two of the involved defendants created the "Swedish Drop Shipment," an entry in FLIR's books

that allegedly recognizes $4.6 million in revenue without substantiation. FLIR's Controller, David Meussle, first discovered the unsubstantiated entry. Meussle believed that Stringer and Samper made the entry. Rosenbaum represented Meussle, as well as Samper and FLIR.

The SEC civil complaint, filed on September 30, 2002, two years after the joint representation began, did not allege a charge relating to the "Swedish Drop Shipment." After Rosenbaum received a copy of the complaint, she called the SEC Staff Attorney, disclosed the existence of the "Swedish Drop Shipment," and facilitated SEC interviews with Meussle in order to enhance the level of FLIR's cooperation with the government. Rosenbaum also sent a memo to the SEC that contained possibly privileged communications she had with Samper about the transaction. The criminal indictment later charged that Stringer and Samper created the false entry. Thus Rosenbaum, while representing Meussle and FLIR, apparently in order to further the interests of FLIR, assisted the SEC's investigation.

C. Proceedings Below

On September 17, 2003, a grand jury returned an indictment charging Stringer, Samper, and Martin with securities, mail, and wire fraud. Defendants filed motions to dismiss the indictments and to suppress statements they made to the SEC. The district court dismissed the indictments and suppressed the

SEC statements because it concluded that the government, in violation of the due process clause, abused its authority to conduct parallel proceedings. *United States v. Stringer,* 408 F. Supp. 2d 1083, 1088-89 (D. Or. 2006). The district court held that the government violated defendants' Fifth Amendment due process rights by using trickery and deceit to conceal the criminal investigation from defendants, *id.* at 1080, and conducting a criminal investigation under the auspices of a civil investigation, *id.* at 1089. The district court suppressed evidence of the "Swedish Drop Shipment" on the basis of its conclusion that the government interfered with Samper's attorney-client relationship in violation of his due process rights. *Id.* at 1091-92.

This appeal by the government followed. This court has jurisdiction pursuant to 18 U.S.C. § 3731.7

III. Discussion

A. The parallel investigations

The Supreme Court has held that the government may conduct parallel civil and criminal investigations without violating the due process clause, so long as it does not act in bad faith. *See United States v. Kordel,* 397 U.S. 1, 11 (1970). In *Kordel,* the Supreme Court held that the government did not violate the due process rights of corporate executives when it used evidence it obtained from an FDA civil investigation to convict them of criminal misbranding. 397 U.S. at 11. The Court explained that the FDA did not

act in bad faith when it made a request for information, which ultimately was used in the criminal investigation, for the agency made similar requests as a matter of course in 75% of its civil investigations. *Id.* at 6. The Court suggested that the government may act in bad faith if it brings a civil action solely for the purpose of obtaining evidence in a criminal prosecution and does not advise the defendant of the planned use of evidence in a criminal proceeding. *Id.* at 12-13. The Court thus distinguished the *Kordel* investigation from bad faith cases where

> the [g]overnment has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; . . . [or] any other special circumstances . . . might suggest the unconstitutionality or even the impropriety of this criminal prosecution.

Id. at 12-13.

The Supreme Court has not had occasion to address such issues since *Kordel,* but lower courts have. In *SEC v. Dresser Industries, Inc.,* the D.C. Circuit applied the principles laid down in *Kordel* to a case involving parallel SEC civil and Department of Justice criminal investigations. *See* 628 F.2d 1368, 1376-77 (D.C. Cir. 1980) (en banc). The court emphatically upheld the propriety of such parallel investigations. "Effective enforcement of the securities laws requires that the SEC and Justice be able to investigate possible violations simultaneously." *Id.* at

1377. The court said it would refuse to bar such investigations absent unusual circumstances. *Id.* It said courts should refuse to "block parallel investigations by these agencies in the absence of 'special circumstances' in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government." *Id.*

District courts have occasionally suppressed evidence or dismissed indictments on due process grounds where the government made affirmative misrepresentations or conducted a civil investigation solely for purposes of advancing a criminal case. *See, e.g., United States v. Carriles,* 486 F. Supp. 2d 599, 615, 619 (W.D. Tex. 2007), *appeal pending,* No. 07-50737 (5th Cir.); *United States v. Rand,* 308 F. Supp. 1231, 1233, 1237 (N.D. Ohio 1970).

In this case, the district court concluded that the government should have told defendants of the criminal investigation and that it violated the standards laid down in *Kordel* when it failed to "advise defendants that it anticipated their criminal prosecution." *Stringer,* 408 F. Supp. 2d at 1088. It held that the government engaged in "trickery and deceit" when the SEC staff attorney instructed court reporters to refrain from mentioning the AUSA's involvement. When the SEC staff attorney responded to Stringer's attorney's question, during Stringer's deposition, by directing him to the U.S. Attorney, the district court concluded that the SEC attorney "evaded the question." *Id.* at 1089.

In its appeal, the government argues that it had no legal duty to make any further disclosure of the existence of the pending criminal investigation. It points to the warnings in Form 1662 in which the government disclosed the possibility of criminal prosecution, and it stresses that it did not make any affirmative misrepresentations. It maintains the SEC attorney's answer was appropriate and truthful.

The defendants argue that the district court properly held that the use of the evidence obtained by the SEC in a criminal prosecution would violate defendants' Fifth Amendment privilege against self-incrimination. The defendants were advised that the evidence could be used in a criminal investigation, but defendants did not invoke their Fifth Amendment privilege during the SEC investigation. The government on appeal correctly contends that defendants waived or forfeited their Fifth Amendment right against self-incrimination.

The privilege against self-incrimination protects an individual from being forced to provide information that might establish a direct link in a chain of evidence leading to his conviction. *Hoffman v. United States,* 341 U.S. 479, 486 (1951). It may be waived if it is not affirmatively invoked. In *Minnesota v. Murphy,* the Supreme Court stressed that the privilege is lost if not affirmatively invoked, even if the defendant did not make a knowing and intelligent waiver. 465 U.S. 420, 428 (1984). We have similarly stated that a "defendant's failure to invoke the privilege against self-incrimination waives a later claim of privilege."

Unruh, 855 F.2d at 1374 (holding that a defendant waived the privilege when, after being advised of his right not to answer questions, he proceeded to testify in a civil deposition).

The district court therefore erred in holding that defendants' waivers of the privilege were ineffective because they were not told of the U.S. Attorney's active involvement. *See Stringer,* 408 F. Supp. 2d at 1089-90. The SEC Form 1662 used in this case alerts SEC investigative witnesses that the information can be used in a criminal proceeding. Defendants were on sufficient notice, and so were their attorneys. As one federal court has explained, all that was required was "sufficient notice . . . that any information could be used against [them] in a subsequent criminal proceeding." *United States v. Teyibo,* 877 F. Supp. 846, 855 (S.D.N.Y. 1995). That court emphasized that "SEC Form 1662 stated in no uncertain terms that the [g]overnment's request for information could be refused pursuant to the Fifth Amendment's protection against compelled self-incrimination." *Id.* We agree.

The SEC here went even further, warning each defendant at the beginning of each deposition that "the facts developed in this investigation might constitute violations of . . . criminal laws." Nonetheless, defendants proceeded to testify and failed to invoke their privilege against self-incrimination. Defendants have forfeited any claims that the use of their testimony against them in the criminal proceedings violates the privilege against self-incrimination.

The defendants next contend that the district court properly concluded that the government used the civil investigation solely to obtain evidence for a subsequent criminal prosecution, in violation of due process. The Supreme Court in *Kordel* made it clear that dual investigations must meet the requirements of the Fifth Amendment Due Process Clause. *See* 397 U.S. at 11-12. While holding that "[i]t would stultify the enforcement of federal law" to curtail the government's discretion to conduct dual investigations strategically, the Court suggested that a defendant may be entitled to a remedy where "the [g]overnment has brought a civil action solely to obtain evidence for its criminal prosecution." 397 U.S. at 11-12. In this case, the government argues that it did not violate defendants' due process rights because the civil investigation was not commenced solely to obtain evidence for a criminal prosecution.

It is significant to our analysis that the SEC began its civil investigation first and brought in the U.S. Attorney later. This tends to negate any likelihood that the government began the civil investigation in bad faith, as, for example, in order to obtain evidence for a criminal prosecution. In *United States v. Unruh,* 855 F.2d 1363, 1374 (9th Cir. 1987), we held that a defendant was not entitled to dismissal of his indictment when the U.S. Department of the Treasury instituted its investigation before any indictment and in order to file its own civil complaint. *See also United States v. Churchill,* 483 F.2d 268, 272 (1st Cir.

1973); *United States v. Teyibo*, 877 F. Supp. 846, 855 (S.D.N.Y. 1995).

United States v. Carriles, 486 F. Supp. 2d 599, 619-21 (W.D. Tex. 2007), on the other hand, is a clear example of government bad faith. The district court dismissed an indictment because the U.S. Citizenship and Immigration Services ("USCIS") interviewed the defendant solely to collect evidence in support of a criminal case against him. 486 F. Supp. 2d at 619-21. The defendant, a Cuban national, filed an application for naturalization. *Id.* at 601. Although USCIS had already determined that the defendant was not eligible for citizenship, the agency nonetheless invited him to a pre-citizenship interview in order to collect evidence for a criminal false statements case. *Id.* at 619. The interview protocol was altered in so many ways to serve the needs of the criminal investigation that it became an interrogation. The court described the "interview" as follows:

> (1) it lasted eight hours over the course of two days as opposed to the usual maximum of thirty minutes, (2) it involved two interviewers, (3) the [g]overnment provided an interpreter, (4) there were a total of four attorneys present – two defense attorneys and two Government attorneys, and (5) it was both audio and videotaped.

Id. Because the "entire interview was . . . a pretext for a criminal investigation," the district court dismissed the indictment. *Id.* at 629-20.

Our case is not remotely similar to *Carriles*. In this case the SEC's civil investigation was opened first, led to SEC sanctions and was conducted pursuant to the SEC's own civil enforcement jurisdiction. It was not a pretext for the USAO's criminal investigation of defendants. Congress has expressly authorized the SEC to share information with the Department of Justice to facilitate the investigation and prosecution of crimes. *See* 15 U.S.C. §§ 77t(b), 78u(d). We must conclude the SEC interviewed the defendants in support of a bona fide civil investigation. There was no violation of due process.

Defendant appellees finally contend that the district court properly concluded that dismissal or, in the alternative, suppression, was warranted because the government lulled the defendants into turning over incriminating evidence by engaging in "trickery and deceit." It was dispositive for the district court that the SEC staff attorney instructed court reporters to refrain from mentioning the AUSA's involvement and that the SEC gave evasive answers to questions about the imminence of a dual investigation. We have previously applied the Fourth Amendment's bar to unreasonable searches and seizures in the context of dual investigations by the civil and criminal branches of the IRS, where review of documentary evidence is inherent in the investigation. We have thus held that a search is unreasonable, even if consensual, if the consent is obtained by trickery or deceit. *See United States v. Robson,* 477 F.2d 13, 18 (9th Cir. 1973). While not every SEC and USAO dual investigation

will necessarily involve a search and seizure, to the extent that the individual defendants may have been led through trickery or deceit to turn over documentary or physical evidence in their possession or to use their official authority to turn over evidence in the possession of the corporation, the defendants could state a claim under the Fourth Amendment.

A government official must not "affirmatively mislead" the subject of parallel civil and criminal investigations "into believing that the investigation is exclusively civil in nature and will not lead to criminal charges." *Robson,* 477 F.2d at 18. However, "we have consistently held that the failure of an IRS agent . . . to warn a taxpayer that an audit may have potential criminal ramifications does not render the search unreasonable." *Id.* at 18-19 (denying suppression where an IRS agent did not expressly advise a taxpayer that the evidence the agent was gathering for a civil audit would be used to support a criminal investigation).

Other circuits have agreed that Fourth Amendment and possible due process limitations may be implicated in a dual investigation. *See United States v. Peters,* 153 F.3d 445, 451 (7th Cir. 1998) ("A consensual search is unreasonable under the Fourth Amendment or violative of due process under the Fifth Amendment if the consent was induced by fraud, deceit, trickery or misrepresentation."). Almost every other circuit has denied suppression, even when government agents did not disclose the possibility or existence of a criminal investigation, so long as

they made no affirmative misrepresentations. *See United States v. Irvine,* 699 F.2d 43, 46 (1st Cir. 1983); *United States v. Sclafani,* 265 F.2d 408, 414-415 (2d Cir. 1959); *United States v. Parenti,* 326 F.Supp. 717, 722 (E.D. Pa. 1971), *aff'd,* 470 F.2d 1175 (3rd Cir. 1971); *Groder v. United States,* 816 F.2d 139, 144 (4th Cir. 1987); *United States v. Prudden,* 424 F.2d 1021, 1030 (5th Cir. 1970); *United States v. Marra,* 481 F.2d 1196, 1203 (6th Cir. 1973); *United States v. Lehman,* 468 F.2d 93, 105 (7th Cir. 1972); *United States v. Grunewald,* 987 F.2d 531, 534 (8th Cir. 1993); *United States v. Kaatz,* 705 F.2d 1237, 1243 (10th Cir. 1983); *United States v. Wuagneux,* 683 F.2d 1343, 1347 (11th Cir. 1982); *United States v. Stamp,* 458 F.2d 759, 777 (D.C. Cir. 1971).

The district court in this case relied on the Eighth Circuit's opinion in *Grunewald,* which said it would be a "flagrant disregard of individuals' rights" to "deliberately deceive, or even lull" a person into incriminating themselves in a criminal investigation being pursued under the guise of a civil one. 987 F.2d at 534. The Eighth Circuit was referring to the criminal defendant's argument that he was the victim of a criminal investigation being pursued in the guise of a civil tax audit. *Id.* The court rejected the argument and affirmed the district court's denial of suppression because there had been no deceit. *Id.* We applied virtually the same standard in *Robson,* where we held that suppression was not appropriate in the absence of affirmative misrepresentations. 477 F.2d at 17-18.

In this case, the SEC made no affirmative misrepresentations. The SEC did advise defendants of the possibility of criminal prosecution. The SEC engaged in no tricks to deceive defendants into believing that the investigation was exclusively civil in nature. The SEC's Form 1662 explicitly warned defendants that the civil investigation could lead to criminal charges against them: "Information you give may be used against you in any federal . . . civil or criminal proceeding brought by the Commission or any other agency." Defendants were represented by counsel, and the government provided counsel, so far as this record reflects, with accurate information. The standard we laid down in *Robson* was not violated.

The defendant-appellees point to a number of collateral facts they argue demonstrate trickery or deliberate misleading. They argue the SEC Staff Attorney affirmatively misled Stringer's attorney when, in response to the attorney's question about other agency involvement, she directed him to the provision in Form 1662 that warned that the SEC would likely turn over to the USAO evidence it collected at the depositions. The Staff Attorney, during the deposition taken in Portland, declined to direct defense counsel to a specific U.S. Attorney's Office, which would have been the Portland Office, but there was nothing false or misleading in her response that it was up to the defendant to decide where to direct his inquiries.

The defendant-appellees also point to the Staff Attorney's request to the court reporters not to mention the AUSA in the presence of defendants' attorneys. While this indicates an intent to prevent disclosure to defendants of the actual criminal investigation, the possibility of criminal investigation should have been well known to both the defendants and their counsel. The request to the court reporters to, in effect, mind their own business did not mislead or misinform defendants about the existence of an investigation. Thus, to the extent that the Fourth Amendment may have been implicated by the dual investigation, the district court erred in concluding that the government's actions in this case constituted an unreasonable search or seizure.

B. Interference with Samper's attorney-client relationship

The district court concluded that the government violated defendant Samper's due process rights when it obtained evidence about the "Swedish Drop Shipment" from Samper's attorney, knowing that she had a conflict of interest. *Stringer*, 408 F. Supp. 2d at 1092. The government argues that it did not deliberately intrude into Samper's attorney-client relationship because all that it did was receive information that Samper's attorney offered the government, wholly independent of any government conduct.

We have held that "government interference with a defendant's relationship with his attorney may

render counsel's assistance so ineffective as to violate . . . his Fifth Amendment right to due process of law." *United States v. Irwin,* 612 F.2d 1182, 1185 (9th Cir. 1980). "'[A] claim of outrageous government conduct premised upon deliberate intrusion into the attorney-client relationship will be cognizable where the defendant can point to actual and substantial prejudice.'" *United States v. Haynes,* 216 F.3d 789, 797 (9th Cir. 2000) (quoting *United States v. Voigt,* 89 F.3d 1050, 1067 (3d Cir. 1996)). A claim of government interference with the attorney-client relationship has three elements: (1) the government was objectively aware of an ongoing, personal attorney-client relationship; (2) the government deliberately intruded into that relationship; and (3), as a result, the defendant suffered actual and substantial prejudice. *Voigt,* 89 F.3d at 1067.

Most cases finding deliberate intrusion into the attorney-client relationship involve government informants who somehow penetrate the attorney-client relationship to obtain confidential or privileged information, and then feed that information to the government. *See, e.g., Haynes,* 216 F.3d at 793-94. In *Haynes,* the defendant's attorney's investigator served as a paid informant for the government. *Id.* at 792. In *United States v. Marshank,* 777 F. Supp. 1507, 1519-1520 (N.D. Cal. 1991), the defendant's attorney served as an unpaid informant for the government by providing the government confidential client information on a regular basis. In contrast, we have held that the government's asking a defendant's

former attorney to turn over privileged information does not constitute deliberate intrusion on the part of the government when the attorney complies. *See United States v. Rogers,* 751 F.2d 1074, 1080 (9th Cir. 1985). "The fact that the attorney failed to assert the ethical obligation does not transform [the government's] investigation into governmental misconduct." *Id.*

For similar reasons, there was no deliberate government interference here. The government did not deliberately intrude into the relationship between Samper and Rosenbaum when it accepted potentially incriminating evidence from Rosenbaum, nor was Rosenbaum a government informant whom the government sought out. *Cf. Haynes,* 216 F.3d at 793-94. In fact, in Form 1662, the government explicitly warned Samper that "[y]ou may be represented by counsel who also represents other persons involved in the Commission's investigation. This multiple representation, however, presents a potential conflict of interest if one client's interests are or may be adverse to another's." The conflict resulted from Rosenbaum's decision, wholly independent of the government, to represent FLIR and Samper. Samper had full knowledge of a potential conflict and consented to the representation. There was no impropriety on the government's part.

Indeed, had the government contacted Samper directly to warn him about the conflict, bypassing his attorney, the government would have engaged in conduct that itself may have amounted to interference.

Cf. Or. Rules of Prof'l Conduct R. 4.2; Model Rules of Prof'l Conduct R. 4.2. The government's receipt of evidence from counsel intended to assist one client, but that also tended to incriminate another, was not an intrusion or intentional interference with the attorney-client relationship and did not justify dismissal of the indictment or suppression of the evidence of the "Swedish Drop Shipment."

IV. Conclusion

For the foregoing reasons, we conclude that there was no deception or affirmative misconduct on the part of the government in the course of the SEC and U.S. Attorney investigations that warranted dismissal of the indictment or suppression of any of the evidence in question. In addition, defendants' Fifth Amendment rights were not violated.

The panel shall retain jurisdiction over any subsequent appeal in this matter.

The judgment of the district court dismissing the indictment is **VACATED**. The district court's suppression ruling is **REVERSED**. The case is **REMANDED** for further proceedings.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

J. KENNETH STRINGER, *et al.*,

Defendants.

CR 03-432-HA

OPINION AND ORDER

HAGGERTY, Chief Judge:

On September 23, 2004, the grand jury issued a Third Superseding Indictment (hereinafter referred to as the Indictment) charging defendants J. Kenneth Stringer (Stringer), J. Mark Samper (Samper), and William N. Martin (Martin) with fifty counts of conspiracy and securities fraud. Defendants are former executives of FLIR Systems, Inc. (FLIR). The Indictment alleges that defendants acted in concert to inflate FLIR's revenues through a series of fraudulent revenue recognition and accounting practices in an attempt to defraud FLIR, its Board of Directors, its shareholders, its auditors, and the United States Securities and Exchange Commission (SEC).

Defendants filed separate Motions to Dismiss the Indictment, or in the Alternative, Suppress Testimony (Docs. #166, 182, 188). The court held eleven days of evidentiary hearings. Oral arguments were heard on November 15-16, 2005. The court rules on each motion in turn below.

Defendant Stringer and Martin's Motions to Dismiss/Suppress

Defendants Stringer and Martin seek to dismiss the Indictment, or, in the alternative, suppress the statements they made to the SEC because the information was produced in violation of their Fourth and Fifth Amendment rights. Specifically, defendants assert that had they been notified of the possibility of the criminal prosecution, they would have sought a stay of the civil proceedings, would not have produced any documents and Martin would not have provided a Wells Submission. Defendants seek dismissal of the Indictment or, alternatively, suppression of their statements made to the SEC in the prosecution's case-in-chief and for impeachment and rebuttal evidence, suppression of all documents provided to the SEC, vacation of the civil judgment entered into by Martin, invalidation of the consent decree, and suppression of Martin's Wells Submission.

The SEC began its investigation of defendants in mid-2000. Shortly thereafter, Assistant United States Attorney Charles Gorder (Gorder) met with Diana Tani, an officer with the SEC, and later requested access to the SEC's investigative files of defendants. Gorder indicated that he was making the request pursuant to ongoing investigation of defendants by the United States Attorney Office's (USAO) and the Federal Bureau of Investigation's (FBI). Gorder also indicated that defendants were the subjects of a Department of Justice investigation.

In August 2000 the SEC met with Assistant United States Attorney Kent Robinson (Robinson) for a preliminary discussion regarding the investigation of defendants. In October 2000 the SEC, the FBI and Robinson met again for an extensive discussion of the case. The SEC provided the USAO and the FBI with five notebooks of documents and a detailed memorandum setting forth the SEC's legal and factual analyses. At this meeting it was decided that the criminal investigation would abate in order to continue receiving statements from defendants and other witnesses through the civil investigation. In a memorandum memorializing the meeting, FBI Agent Boyer wrote:

> It was determined that since Stringer has agreed to be interviewed by the SEC, the FBI will make no effort to interview Stringer or other corporate officers at this time so as not to jeopardize the opportunity to obtain statements from these individuals.

Stringer Ex. 59, Letter from Agent Boyer, FBI, to Kristine Olson, SEC, at 2 (October 20, 2000).

Ten days after meeting with the SEC and FBI, Robinson requested funding for a computer system for the FLIR investigation and stated that absent a "persuasive and complete explanation" the case "warrants prosecution." Stringer Ex. 101, Memorandum from Kent Robinson, to Judy Kobbervig, *et. al.*, USAO, at 2 (October 13, 2000). Robinson noted that the USAO would "benefit greatly" from the SEC's investigation and stated that the "probability of

prosecution is very high." *Id.* Robinson also identified Martin, Stringer and Samper as potential targets. Stringer Ex. 100, Handwritten Notes of Kent Robinson, at 3 (October 3, 2000).

In January 2001 the SEC investigators visited the FLIR facilities. Following the visit, the SEC, FBI and USAO met to discuss the progress of the investigation. In that meeting it was decided that the criminal investigators would continue to allow the civil investigators to handle the investigation. In a memorandum memorializing the meeting, FBI Agent Boyer stated that "AUSA Robinson advised that based on the level of cooperation that the new FLIR management team has extended to the SEC, no overt investigation will be conducted by the FBI at this time." Stringer Ex. 62, Memorandum from Agent Boyer, FBI, to Gordon Compton, FBI, at 3 (February 5, 2001).

The USAO continued to rely on the work product generated by the SEC investigators. Robinson explained that FLIR was cooperating and so "a decision was made not to pursue a parallel grand jury investigation" but to "passively observe[ ] the results of the SEC's work." Stringer Ex. 101, Memorandum from Robinson to Judy Kobbervig, *et. al.*, at 1 (April 4, 2001). Robinson noted this strategy had "provided good investigative results, at little cost to us" and that the "SEC's investigation continues to suggest that this case will produce a criminal prosecution." *Id.* Robinson also reiterated that the investigation continued to implicate Stringer and Samper. *Id.*

The civil and criminal investigators communicated regularly throughout the civil investigation, exchanging information and discussing strategy. Robinson advised the SEC that he was interested in false testimony cases and explained how to create the best record possible for such cases. Stringer Ex. 66, E-mail from Lorraine Echavarria, SEC, to Diana Tani, *et. al.*, SEC, at 1 (April 5, 2001). The SEC forwarded this information to "all testimony takers so that we will know and understand what Kent needs/wants to prosecute a false testimony case." *Id.* The SEC also agreed to conduct certain interviews in Oregon to provide potential jurisdiction for the Oregon USAO, despite the inconvenience to the SEC investigation.

Robinson identified to the SEC that Samper and Stringer were targets. *Id.* The SEC expressed a desire to "convince him to expand" targets beyond Samper and Stringer. *Id.* A few months later the USAO and FBI traveled to Los Angeles to meet with the SEC and maintained that Samper, Stringer, Martin and two others were targets of the investigation. Stringer Ex. 71, Memorandum from Agent Compton, FBI, to Agent Boyer, FBI, at 2 (July 5, 2001).

In June 2001 SEC attorney Lorraine Echavarria (Echavarria) and Assistant United States Attorney Allan Garten (Garten) discussed the criminal investigation and decided to wait before commencing parallel proceedings, noting that with such proceedings the SEC action would be stayed and that defendants and FLIR would most likely settle unless the USAO was involved. Stringer Ex. 69, Handwritten Notes of

Echavarria, at 3 (June 6, 2001) (hereinafter Stringer Ex. 69). In December 2001, the SEC and USAO decided it was still "premature to surface," and that the presence of the USAO would "impede" a scheduled meeting with FLIR. Stringer Ex. 75, Handwritten Notes of Diana Tani, at 1 (December 19, 2001).

The civil investigators were aware of the need to suppress the presence of the USAO. Echavarria noted to "make sure court reporters won't tell [FLIR's attorney] about Kent." Stringer Ex. 60, Handwritten Note of Echavarria. Echavarria also wrote to Assistant United States Attorney Allan Garten (Garten), requesting he stay away from SEC interviews because FLIR's attorney would be present and noting "[i]f you plan to surface to company [FLIR] counsel soon, that is a decision we would like to discuss with you prior to you making it." Stringer Ex. 70, E-mail from Echavarria, SEC, to Garten, USAO, at 1 (July 3, 2001). Echavarria and Garten discussed the strategy for the case and decided that the USAO would "surface end of Jan/early Feb [2003]" and with "no notice." Stringer Ex. 94, Handwritten Note of Echavarria (December 20, 2002).

Defendants were subpoenaed to testify before the SEC and were informed that disclosure of information to the SEC is mandatory, subject to the valid assertion of any legal right or privilege. The subpoenas also stated that failure to provide information could result in a court order compelling such information followed by criminal sanctions. Defendants were given the standard SEC Form 1622, which is given to

all testifying witnesses. This form informs witnesses of their right to counsel, their Fifth Amendment rights, and the routine uses of information. The "routine uses" listed included a proviso that the SEC often makes its files available to other governmental agencies, particularly the USAO. Form 1662 also noted that any information given to the SEC may be used in any federal criminal proceeding.

Defendants assert that their due process rights were violated because they were not advised that the prosecutor and the FBI were using the SEC to gather evidence for a criminal prosecution. They argue that this prejudiced them because their Fifth Amendment right not to be compelled to testify was removed; they lost the opportunity to seek immunity from, or to cooperate with the prosecution; they were unable to seek a stay of the proceedings; the prosecutor and the FBI were granted more discovery than they would have been entitled to under the Federal Rules of Criminal Procedure; and Martin provided to the prosecution through the Wells Submission any and all defenses he may have had to the subsequent criminal charges.

Stringer testified before the SEC on October 29, 2001. He asserts that neither he, nor his attorney, was aware that the prosecution was contemplating criminal charges against him. In a dialogue with Echavarria, Stringer's attorney asked the following questions and received the following responses:

STRINGER'S ATTORNEY: My first question is whether Mr. Stringer is the target of any aspect of the investigation being conducted by the SEC.

ECHAVARRIA: The SEC does not have targets in this investigation.

STRINGER'S ATTORNEY: The other questions I have relate to whether or not, in connection with your investigation, the SEC is working in conjunction with any other department of the United States, such as the U.S. Attorney's Office in any jurisdiction, or the Department of Justice.

ECHAVARRIA: As laid out in the 1662 form, in the "routine use of" section there are routine uses of our investigation, and it is the agency's policy not to respond to questions like that, but instead, to direct you to the other agencies you mentioned.

STRINGER'S ATTORNEY: And which U.S. Attorney's office might I inquire into?

ECHAVARRIA: That would be a matter up to your discretion.

Defendant Stringer's Memorandum in Support of Motion to Dismiss, Ex. 8.

Defendants argue that the SEC and USAO worked together on a single investigation, with the USAO hiding behind the SEC to sidestep defendants' constitutional rights that they would have otherwise

asserted in the criminal proceeding, and build up its criminal case against them.

The prosecution argues that the USAO and the SEC were conducting parallel proceedings, which is an acceptable approach for civil and criminal authorities investigating the same matter. *See United States v. Kordel,* 397 U.S. 1, 11 (1970); *Securities and Exchange Comm'n v. Dresser Indust.,* 628 F.2d 1368 (D.C. Cir. 1980). The prosecution also argues that defendants were provided with adequate notice that their statements could be used in a criminal prosecution through Form 1662.

The court concludes that these were not parallel investigations. The USAO identified potential criminal liability and a few targets in the beginning of the investigation, and elected to gather information through the SEC instead of conducting its own investigation. The government was concerned that the presence of a criminal investigation would halt the successful discovery by the SEC, witnesses would be less cooperative and more likely to invoke their constitutional rights, and that the rules of criminal discovery would be invoked. Stringer Ex. 69, at 3 (June 6, 2001) (memorializing a telephone conversation between Echavarria and Garten wherein Garten explains that once there is an indictment "discovery is over. Criminal is totally 1 sided" and that he would then give everything and get nothing). The government was aware that there was no parallel proceeding. *See* Stringer Ex. 78, Draft E-mail from Diana Tani to Laurie Stegman (noting that Garten wanted

to see what the SEC put together "rather than running his own parallel criminal investigation"); Stringer Ex. 101, Memorandum from Robinson to Judy Kobbervig, *et. al.*, at 1 (April 4, 2001) (stating that a decision was made "not to pursue a parallel grand jury investigation").

The delay by the USAO was not for the purpose of reviewing evidence gathered by the SEC to make an informed decision as to whether the case warranted prosecution. From the beginning, the USAO consistently held the position that a criminal prosecution was likely. Almost a year after the SEC investigation began and two years before the USAO made its presence known, the USAO reiterated its position that the case would most likely warrant criminal prosecution, yet decided not to conduct a parallel criminal investigation. Stringer Ex. 101, Memorandum from Robinson to Judy Kobbervig, *et. al.*, at 1 (April 4, 2001). Moreover, the USAO was actively involved in the SEC investigation: meeting regularly, receiving documents, requesting interviews be conducted in Oregon to establish jurisdiction, advising what information was needed for a successful criminal prosecution, specifically instructing on how best to conduct interviews to gather evidence for false statement cases, intentionally hiding its presence from FLIR's attorneys, and repeatedly planning with the SEC as to when it would be best to surface and conduct an overt criminal investigation.

The strategy to conceal the criminal investigation from defendants was an abuse of the investigative

process. In *Kordel,* the Court found there was no abuse in using the civil discovery process to obtain evidence later used in a criminal proceeding because the case was not one in which the government "failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution . . . nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution." This case clearly falls within the scenario contemplated by the Supreme Court as a "violation of due process or a departure from proper standards in the administration of justice." *Kordel,* 397 U.S. at 11. In this case, the government did not advise defendants that it anticipated their criminal prosecution. Moreover, the USAO intentionally shielded its intentions behind the guise of a civil prosecution, resorting to subterfuge to maintain the secrecy of its involvement.

Defendants had been identified consistently as "targets" or "subjects," and yet the government failed to alert them to the possibility of criminal exposure beyond presenting the standard form that is given to every individual, whether or not a target, prior to testifying. In light of the active role of the USAO in the SEC investigation, this warning was insufficient. *See, e.g., United States v. Thayer,* 214 F. Supp. 929, 933 (D. Colo. 1963) (noting that "the giving of the warning can not have much significance where the defendant was, so to speak, then within the sights of the Government and did not receive an explanation of the true import of the [ ] inquiry").

In addition, it is a due process violation if government agents make affirmative misrepresentations as to the nature or existence of parallel proceedings or otherwise use trickery or deceit. *United States v. Robson,* 477 F.2d 13, 18 (9th Cir. 1973). Echavarria's response to the direct inquiry by Stringer's attorney as to the existence of a criminal investigation was evasive and misleading, particularly in light of the close association between the USAO and the SEC throughout the investigation and the early identification of Stringer as a criminal target.

A government agency may not develop a criminal investigation under the auspices of a civil investigation. *United States v. Grunewald,* 987 F.2d 531, 534 (8th Cir. 1993). It would be a "flagrant disregard of individuals' rights" to "deliberately deceive, or even lull" someone into incriminating themselves in the civil context when "activities of an obvious criminal nature are under investigation." *Id.* (referencing a civil tax audit versus a criminal tax investigation). Here, defendants were identified as subjects of a criminal investigation. The government's tactic to move forward under the guise of a civil investigation, violated defendants' due process rights. *Robson,* 477 F.2d at 18 (finding that the government can not "affirmatively mislead the taxpayer into believing that the investigation is exclusively civil in nature and will not lead to criminal charges"). The USAO confirmed its commitment to a criminal case, but emphasized to the SEC that it would "need to be spoonfed" the evidence from the civil investigation.

Stringer Ex. 73, E-mail from Garten, USAO to Echavarria, SEC (November 6, 2001).

Assuming, *arguendo,* that these were parallel proceedings, dismissal of the indictment or suppression of voluntary testimony given in a parallel civil proceeding is warranted if the government engaged in deceit, trickery, or intentional misrepresentation. *United States v. Tweel,* 550 F.2d 297, 300 (5th Cir. 1977). Here, the government engaged in deceit and trickery to keep the criminal investigation concealed. The government went so far as to instruct court reporters to refrain from mentioning the U.S. Attorney's involvement and to have Garten avoid being near certain interviews for fear his presence would cause the criminal investigation to surface. Moreover, Echavarria misled Stringer and his attorney into believing he was not a target and evaded the question about the USAO's involvement.

Dismissal of an indictment is warranted if the alleged governmental misconduct is "so grossly shocking and so outrageous as to violate the universal sense of justice." *United States v. Smith,* 924 F.2d 889, 897 (9th Cir. 1991); *United States v. Ramirez,* 710 F.2d 535, 539 (9th Cir. 1983). The conduct involved in this case meets that standard. The USAO spent years hiding behind the civil investigation to obtain evidence, avoid criminal discovery rules, and avoid constitutional protections. In *United States v. Rand,* the court dismissed the indictment, finding that the government had "engaged in an obnoxious form of using parallel proceedings." 308 F.Supp. 1231,

1234 (N.D. Ohio 1970). The government "may not bring a parallel civil proceeding and avail itself of the civil discovery devices to obtain evidence for subsequent criminal prosecution." *United States v. Parrott,* 248 F.Supp. 196, 202 (D.D.C. 1965). The facts in this case are more egregious, as it cannot credibly be claimed that these were parallel proceedings.

Moreover, defendants Fifth Amendment rights were violated. As defendants were unaware of the involvement of the USAO, it is "unrealistic to suppose that defendant[s] [would] be on guard against incriminating [themselves]." *Rand,* 308 F.Supp. at 1237. As such, "it is unfair in the extreme to penalize defendant[s] for failure to invoke [their] privilege against self-incrimination." *Id.*

In view of these findings, to "simply suppress the evidence which the government obtained by the methods explored above would not be sufficient to remedy the violation of defendant[s] constitutional rights." *Id.* at 1238. Accordingly, the indictments are dismissed.

Defendants' statements to the SEC were gathered in violation of defendants' due process and Fifth Amendment rights. *Kordel,* 397 U.S. at 12; *Robson,* 477 F.2d at 18. In the event the Ninth Circuit Court of Appeals determines that dismissal of the indictment is in error, for the foregoing reasons, the statements and the evidence obtained from those statements are suppressed.

Defendant Samper's Motion to Dismiss/Suppress

Samper seeks dismissal of the Indictment for violations of his Fifth Amendment Due Process rights, or, alternatively, suppression of all evidence obtained as a result of the violation. Samper joins in the arguments of Martin and Stringer discussed above, and also raises the claim that the government took unfair advantage of Stoel Rives' conflict of interest while pressing for a criminal prosecution.

Samper, former Chief Financial Officer of FLIR, tendered his resignation in February 2000 in the midst of FLIR's public announcements of accounting errors and fallen earnings. Shortly thereafter, the SEC began investigating FLIR and several employees, including Samper. In March 2000, Lois Rosenbaum (Rosenbaum) of Stoel Rives offered to undertake joint representation of Samper, Stringer, and FLIR. Samper indicated that he had already retained independent counsel, but on May 15, 2000, Samper consented to joint representation. On June 30, 2000, Samper was subpoenaed to testify before the SEC.

In July 2000, Echavarria wrote a letter to Rosenbaum, indicating that she was concerned that Stoel Rives was still representing FLIR and several FLIR employees, including Samper:

> Although it is far too early in the investigation of the SEC staff to identify people who may possess liability, we are troubled by the scope of [Stoel Rives'] representation. We

> urge you to stringently evaluate and assess your conflicts prior to continuing with this method of representation. Further, we hope that the possibility of conflicts has been sufficiently explained to all of your putative clients.

Government's Opposition to Defendant Samper's Motion to Dismiss (Govt.'s Opp. to Def. Samper's Mot. to Dismiss), Ex. 20. Rosenbaum responded that she was aware of her ethical obligations and would act accordingly.

Upon advice of Stoel Rives counsel to fully cooperate with the government to avoid liability, Samper testified before the SEC on October 19, 26, and 27, 2000, and later disclosed all FLIR documents in his possession. A second round of interviews was conducted in October and November 2001. At the hearings, Samper was provided the standard SEC Form 1662, which outlined the rights of witnesses and the "routine uses" that the SEC makes of information provided.

The SEC also interviewed several other FLIR employees, many of whom were represented by Stoel Rives and provided either directly incriminating testimony against Samper or provided testimony contrary to Samper's.

On March 8, 2002, FLIR submitted a Wells Submission and stated that civil enforcement proceedings were unnecessary because FLIR had terminated Samper, one of the key employees who had

brought FLIR into the financial quandary: "FLIR does not contest that significant accounting errors were made in the 1998 and 1999 fiscal years. However, the problems that existed in those years are the problem of a company that no longer exists. . . . The individuals who were responsible for the accounting errors have been terminated, and the Company is under new executive and financial management." Defendant Samper's Memorandum in Support of Motion to Dismiss (Def. Samper's Mem. in Supp. of Mot. to Dismiss), Ex. 36, at 1, 6. Shortly thereafter, FLIR entered into a settlement agreement with the SEC wherein they agreed to not violate securities laws in the future. The SEC filed its Complaint against Samper in September 2002.

Samper claims that during the course of negotiating a settlement with the SEC, he asked Echavarria whether a criminal prosecution would follow. Samper asserts that Echavarria misled Samper and deliberately concealed from him the fact that the USAO had already accepted SEC's referral of a criminal prosecution and was actively involved in the investigation.

In January 2003, the prosecutor met with Rosenbaum, wherein she assured the prosecutor that FLIR intended to cooperate in the criminal investigation. *Id.*, Ex. 41. On March 5, 2003, Ms. Rosenbaum sent Samper a letter stating that the Department of Justice had informed her that it was investigating Samper and other FLIR employees. *Id.*, Ex. 42. She indicated that Stoel Rives would continue to act as FLIR's counsel, with Samper's permission, but would

no longer represent individuals, including Samper. *Id.* On April 11, 2003, Samper agreed to have Stoel Rives continue as FLIR's counsel, with the proviso that Stoel Rives would not disclose Samper's "secrets and confidences [or] affirmatively assist the DOJ in developing its case." Def. Samper's Mem. in Supp. of Mot. to Dismiss, Ex. 43. Samper argues that Stoel Rives, through Ms. Rosenbaum, continued to represent FLIR and several FLIR employees who continued to provide useful information to the SEC and the prosecutor in the corresponding civil and criminal proceedings. Def. Samper's Mem. in Supp. of Mot. to Dismiss, Ex. 44.

Samper argues that, as a result, the SEC and the prosecutor continued to exploit what they knew to be a blatant conflict of interest in having Samper's former attorney assist the prosecution in building its criminal case against him. Specifically, Samper argues that the government interfered with Samper's relationship with Rosenbaum by: exploiting Stoel Rives' conflict of interest in representing both FLIR and Samper; failing to advise Samper of facts that would have revealed the conflict of interest; failing to obtain a court order removing Stoel Rives as Samper's counsel; misleading Samper as to whether a criminal investigation had been initiated; using Stoel Rives to gather incriminating evidence against Samper; and depriving Samper of zealous representation and conflict-free advice.

Government interference with a defendant's relationship with his attorney may render the

counsel's assistance so ineffective as to violate the defendant's Fifth Amendment right to due process of law. *United States v. Irwin,* 612 F.2d 1182, 1185 (9th Cir. 1980). However, not all government action that could arguably be called an interference is unlawful. *Id.* "[T]he right is only violated when the intrusion substantially prejudices the defendant," such as using evidence gained through the interference against the defendant at trial, using confidential information pertaining to the defense plans and strategy, causing the defendant to lose confidence in his or her attorney, and other actions intended to give the prosecution an unfair advantage at trial. *Id.* at 1187 (referencing the Sixth Amendment right to counsel, which differs from the Fifth Amendment in that it is triggered once an indictment is issued). When an apparent conflict of interest between the defendant and defense counsel comes to the attention of the government, the government is under an obligation to bring the issue to the trial court's attention and, if necessary, move for disqualification of counsel. *United States v. Tatum,* 943 F.2d 370, 379-80 (4th Cir. 1991).

As discussed above, the SEC was aware that a criminal prosecution would most likely occur, and was actively involved in obtaining evidence for the purposes of criminal prosecution. The government was the only party involved who knew the degree of the conflict of interest in having Rosenbaum represent Samper, FLIR and the other witnesses. Rosenbaum and Samper were not aware of the involvement of the USAO and the intended criminal prosecution. Under

these circumstances, the government should have moved for disqualification of counsel. *Id.*; *Securities Exchange Comm'n v. Higashi,* 359 F.2d 550, 553 (9th Cir. 1966) (noting that multiple representation is allowed only when there is no conflict of interest); *Kentucky West Virginia Gas Co. v. Pennsylvania P.U.C.* 837 F.2d 600, 618 (3rd Cir. 1988) (discussing *Higashi* and finding that ordering parties to retain separate counsel when there is a conflict of interest does not violate due process or the Administrative Procedures Act).

In this case, the government took advantage of counsel's conflict of interest and obtained information it might not have otherwise received. After the SEC filed its Complaint, Rosenbaum telephoned the SEC and expressed surprise that the Swedish drop shipment was not identified as a fraudulent transaction. Samper had described the transaction to Rosenbaum, and Rosenbaum, in turn, identified the transaction and provided the supporting documents to the SEC. This charge was then included in the Indictment. Rosenbaum's desire to cooperate with the government on behalf of FLIR resulted in additional charges against her other client, Samper. The evidence relating to the Swedish drop shipment was improperly obtained by the government. *Irwin,* 612 F.2d at 1187.

For the reasons discussed above in the Stringer and Martin motions, the egregious behavior of the government warrants dismissal of the indictment against Samper. In the event the Ninth Circuit Court of Appeals finds dismissal of the indictment to be in

error, suppression of the SEC statements and the evidence obtained from those statements is warranted. Additionally, in light of the particularized harm to Samper by the government's improper behavior regarding Rosenbaum's conflict of interest, the evidence relating to the Swedish drop shipment and anything derived from that evidence is also suppressed. Charges related to the Swedish drop shipment are also stricken from the Indictment.

CONCLUSION

Defendant Stringer's Motion to Dismiss the Indictment (Doc. #182-1) is GRANTED. Defendant Stringer's Motion to Suppress SEC Interview Statements (Doc. #182-2) is GRANTED. Defendant Stringer's SEC interview statements and any evidence derived from those statements are suppressed. Defendant Martin's Motion to Dismiss the Indictment (Doc. #166-1) is GRANTED. Defendant Martin's Motion to Suppress Statements and Documents (Doc #166-2) is GRANTED. Defendant Martin's SEC interview statements and any evidence derived from those statements are suppressed. Defendant Samper's Motion to Dismiss the Indictment for Violation of Due Process (Doc. #188-1) is GRANTED. Defendant Samper's Motion to Suppress Evidence (Doc. #188-2) is GRANTED. Defendant Samper's SEC interview statements and any evidence derived from those statements are suppressed. Additionally, the evidence related to the Swedish drop shipment is

suppressed and any reference to the Swedish drop shipment in the Indictment is hereby STRICKEN.

IT IS SO ORDERED.

Dated this 9 day of January, 2006.

/s/ Ancer L. Haggerty
Ancer L. Haggerty
United States District Judge